

The Law of Arrest and Similar Procedures: A Comparative Study

A Thesis Submitted to the Award of the Ph.D.

by

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To my parents and my wife

Abstract

Arrest as an investigation tool in the hand of the police no longer aims merely to bring an accused person before a court. In its modern conception arrest is used by the police to enable them to achieve several purposes. First, the police may use their power of arrest to hold a suspected person in a police station in order to question him about the crime of which he is suspected, or to adopt other procedures. The police may use the power of arrest as a preventive procedure, for instance, when they effect arrest to prevent a breach of peace. Therefore the police frequently rely on arrest to fulfil their duties in investigating crimes and to secure the peace of society.

No society can be void of crime and criminals. Thus states often include in their laws provisions conferring upon the police powers of arrest whether they with or without a warrant. On the other hand states respect the civil rights of their citizens by including in these laws provisions to prevent the police from abusing their powers of arrest, in order to set a balance between the right of the state to fight crime and punish criminals, and the right of individuals to enjoy their lives without infringement.

This thesis deals with the law of arrest and it highlights its important points. It considers and examines the definition of arrest, elements which constitute it, and procedures similar to it, such as stoppage and detention. The study discusses and analyses police powers in respect to arrest, whether with or without a warrant. It also presents the safeguards for the person under arrest, procedures incident to arrest and remedies for unlawful arrest.

We discuss these matters throughout different jurisdictions with different systems of law. These jurisdictions are Egyptian law and UAE law on the one hand, and English law and Scottish law on the other.

DECLARATION

I hereby declare that this thesis has been composed by myself alone and that the work which enabled it to be produced was carried by myself alone.

Ahmed Eid Al Mansoori

Preface and Acknowledgements

I have faced some difficulties during the course of preparing and writing this thesis. First, the lack of cases and materials relating the laws of Egypt and the United Arab Emirates (UAE) in respect of the law of arrest. Second, most of the literature relating to Egyptian law is repetitive. Third, with the exception of very few codes almost all the materials relating to the laws of Egypt and the UAE are written in Arabic translation of which required great effort.

I wish to express my thanks to all people who have provide me with assistance and encouragement during the course of preparing this study. I am especially indebted to my Supervisor Professor R. Black for his invaluable assistance, encouragement and thoughtful and constant guidance and comments. I am also grateful to my second Supervisor Professor R.A.A. McCall Smith for his support and encouragement.

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Abbreviations

| | |
|------------|---|
| A.C | Law Report Appeal Cases |
| All E R | All English Law Reports |
| C.J.A | Criminal Justice Act |
| CID | Criminal Investigation Department |
| CJPO | Criminal Justice and Public Order Act 1994 |
| CLRC | Criminal Law Revision Committee |
| Cmnd | Command Paper |
| Cr App Rep | Criminal Appeal Reports |
| Crim L R | Criminal Law Review |
| D.P.P | Director of Public Prosecution |
| E.D.D.C.C | Egyptian Digest of the Decisions of the of Cassation Court |
| ECHR | European Court of Human Rights |
| FCM | The Federal Council of Ministers |
| FNC | The Federal National Council |
| FSC | The Federal Supreme Council |
| HMSO | Her Majesty's Stationary Office |
| J.L.S.S | Journal of the Law Society of Scotland |
| J.R | Judicial Review |
| MCA | Magistrate Court Act |
| PACE | Police and Criminal Evidence Act |
| Q.B | Law Reports, Queen's Bench Division |
| R.T.R | Road Traffic reports |
| S.C.C.R. | Scottish Criminal Case Reports |
| S.L.T | Scots Law Times |
| SI | Statutory Instrument |
| UAE | United Arab Emirates |
| W.L.R | Weekly Law Reports |

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Introduction

Arrest is considered one of the most important procedures which can be carried out during pre-trial investigations. Pre-trial investigation is the means whereby crimes are unveiled and criminals detected. It is the basis for subsequent inquiries. On the other hand, it tends to conflict with individual rights and liberties. Consequently, modern criminal procedural laws contain provisions regulating this stage including, its scope, duration and persons who are entitled to carry it out. This is in order to keep a balance between two conflicting interests, namely the interest of the state to keep society secure by fighting crime and pursuing criminals, and the interest of the individual to exercise his rights without disturbance.¹

The procedures which most infringe upon the individual's rights during pre-trial investigation are arrest, search and detention pending investigation. This study confines itself to one of these procedures, namely the arrest of a person who is suspected of committing a criminal offence.

Arrest in its modern conception no longer aims merely to bring an accused person before a court to be judged. Arrest is considered an effective investigative tool in the hands of the police. The police may arrest a person and hold him at a police station in order to question him about the offence of which he is suspected. Arrest may be used as a preventive procedure when it is carried out to prevent, for example, a breach of the peace.² Therefore the police frequently rely on arrest to fulfil their duty in investigating crime. This may sometimes lead to an infringement upon an innocent person's freedom. Thus, criminal laws which contain powers of arrest should consider the liberty of individuals by stating provisions which prevent any infringement of the individual's rights and

¹ See Abu-Katwah.A.S., *Sharh Qamun Al-Ijra'at Al-Jaza'iyyah Li Dowlat Al-Imarat Al-Arabiah Al-Mutahidah Al-Juz Al-Thani* Matba'at Al-Bayan (Arabic) (Explanation of the UAE Penal Procedure Law part 1) Al-Bayan Press (Dubai 1990) pp. 8,9.

² Gane.C.H.W., & Stoddart.C.N., *Criminal Procedure In Scotland: Cases & Materials* (2nd edn: W. Green/Sweet & Maxwell 1994) p. 114.

freedom, or at least which minimize such an infringement. This, however, cannot be achieved unless the laws firstly, specify the scope of police powers regarding arrest, and secondly, contain certain safeguards for persons under arrest, considered together with sufficient remedies for illegal arrest.

Arrest as a procedure which apparently violates person's liberty is broadly considered within the provisions of international and regional organizations concerned with human rights. Thus it is desirable to mention initially the most recognized conventions and agreements which contain provisions dealing with the arrest of persons. These are as follows:

Article 9 of *The Universal Declaration of Human Rights 1948* provides:

No one should be subject to arbitrary arrest, detention or exile.

The UN International Covenant on Civil and Political Rights contains provisions stating the rights of the person under arrest and his right to compensation. Article 9 provides:

- 1- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- 2- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- 3- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
- 4- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The European Convention on Human Rights sets out significant principles dealing with the situations where a person may be arrested or detained, the rights of the arrested or detained person and the compensation to which such a person is entitled for unlawful arrest or detention. Article 5 provides:

1- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2- Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3- Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a

reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4- Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5- Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

This study will take the form of a comparison between two different criminal procedure systems: the accusatorial system represented by English law and Scottish law, and the inquisitorial system represented by Egyptian law and the UAE law.

The importance of discussion concerning these laws arises from three points. First, although English law and Scottish law may both be considered as common law systems, each however deals with the law of arrest in a different way. Arrest under Scottish law in general is still governed by common law, which is unlike the situation under English law, particularly after the passing of the Police and Criminal Evidence Act 1984, which made substantial changes in the law governing arrest. Therefore it is appropriate to take a close look at the modifications introduced in England by the 1984 Act in the law of arrest and compare it with what exists in Scottish law.

Second, the law of arrest in the UAE is enacted by the UAE Penal Procedure Act 1992. And since the passing of the 1992 Act it seems that no study has yet covered the area of arrest. This lack of research is due to two reasons. First, the shortness of the period of time that has lapsed since the passing of the 1992 Act. Second (and this seems to me the main reason), the similarity between the provisions relating to arrest under the 1992 Act and the provisions for arrest under the Egyptian Criminal Procedure Act 1950 and its amendments, which made scholars and researchers concerned with UAE law content with the studies and literature covering Egyptian law. This is what stimulates the researcher to consider arrest under Egyptian law in this study.

Third, from examining the developments of the law of arrest under both English and Scottish law suggestions for improving the law of arrest in the UAE may emerge.

The thesis is divided into five chapters. The first one is devoted to dealing with the political and legal background of the UAE. It concentrates on the role of the police and public prosecution and the relation between them during the pre-trial investigation stage. Chapter two deals with arrest and other similar procedures which may be carried out during the pre-trial investigation. Chapter three specifies the scope of arrest through discussion of police powers regarding arrest, whether with or without a warrant. It also considers arrest by ordinary persons. Chapter four discusses safeguards for an arrested person and it deals with the rights of such a person to keep silent when questioned by police or public prosecution. Chapter five considers procedures incidental to arrest, such as entering and searching of premises and searching of persons. It also focuses attention on the use of force to effect arrest, the right of persons to resist arrest and remedies which are available for unlawful arrest.

The UAE Political and legal Background

The UAE Political and legal Background



The United Arab Emirates (UAE) is new the name of the Omani Coast Emirates or Trucial States of Oman, used since it chose to be one state by uniting into a federal state after the announcement of British withdrawal from the region in 1968.¹

The UAE was declared an independent sovereign state on 2 December 1971. After the declaration of its independence, the new state was accorded international recognition by the United Kingdom and foreign states. On 6 December 1971, it joined the League of Arab States and, on 10 December 1971, it was formally admitted to membership of the United Nations.²

The UAE is considered one of the smallest countries represented at the United Nations. Its population is 2,011,000 (the 1992 figure), and about 70 per cent of this is composed of non-UAE citizens.³ It covers an area of some 82,880 sq. km. lying on the eastern side of the Arabian Peninsula on the Arabian Gulf, it is bordered by Saudi Arabia to the west and south, by Oman to the south-east and north-east and by Qatar to the north-west. It consists of seven Emirates : namely, Abu-Dhabi , Dubai, Sharjah, Ras al-Kaimah , Ajman , Umm al-Qaiwain and Al- Fujayrah.

¹ Al- Baharna. H., *The Arab Gulf States: Their Political Legal Status and their International Problems*, Librairie Duliban (Beirut 1975) p.xlvi.

² Ibid, p.xlvii.

³ Central Statistical Department, Ministry of Planning, Statistical Review, 1992.

Section (1) The legal status of the UAE

(1) Prior to the federation

The recorded modern history of the Arabian Gulf began with the inception of Portuguese influence in the region during the sixteenth century.⁴ The Portuguese destroyed the Hurmoz state, which was very well-known in the area, being located at the entrance to the Arabian Gulf in the Hurmoz strait. The Hurmoz state was different from present-day Hurmoz which belongs to Iran. It was an Arab land, controlling trade between India and East Africa.⁵

After about one hundred years of predominance in the Gulf, the Portuguese were finally driven out by the Persians, assisted by the British, in or about 1622.⁶

In the beginning, British government interest in the Gulf was of a commercial character. It started in 1763, when the British East India Company opened a residency at Bushire, on the Persian side of the Gulf. At that time trade in the Gulf was controlled by the biggest tribe, which was known as Al-Qawasim.

When the British Government came to the region it deprived the local inhabitants of their right to engage in trade in the Gulf. As a result, Al-Qawasim attacked the British navy in the Gulf. The British Government considered this attack as amounting to piracy, so it carried out an expedition against what had been known as the Trucial Coast represented by the Al-Qawasim tribe, resulting in the Treaty of Peace of 1820 with the Arab Sheikhs of the Trucial Coast as well as with the Sheikh of Bahrain.

After the signing of the General Treaty of 1820 with the Trucial States the policy of Britain became restricted to securing the peace and the

⁴Al-Baharna H., *supra* n. 1 p. 5.

⁵Al-Aydaros. M.H., *Dowlat Al-Imarat Al-Aarabiah Al-Mutahidah min Al-Istعمار ila Al-Istiqlal* (Arabic) (The UAE from Colonialism to Independence), (Kuwait 1989) p. 20.

⁶Al-Baharna. H., *supra* n. 1 p. 5.

suppression of piracy in the Gulf. The stringency of British policy in this respect manifested itself also in the insistence on applying the conditions of the treaty to tribes who had not signed it.⁷

One of the most important treaties was concluded in 1892. This was known as an Exclusive Agreement by which the British Government deprived the Trucial States of their external sovereignty and became their official representative abroad. It also limited the authority of the Trucial Sheikhs within their territories to deal directly with matters which might expose them to the influence of foreign powers.⁸

The rulers of the states took it upon themselves to comply with the following obligations : firstly, not to enter into any foreign agreement or correspondence, save through the British Government ; secondly, not to allow the residence within their territories of any foreign agent without the consent of the British Government. In return, the British Government undertook to protect the states from any external threat and to preserve the autonomous entities of these states as well as protecting their political and economic interests abroad.⁹

The Trucial States remained under the protection of the British Government until the latter decided to withdraw from the region in 1968.

Prior to British protection the Sheikhdoms were considered as independent states with full sovereignty. This can be seen from the fact that the British Government treated the rulers of these Sheikhdoms as heads of independent governments. These governments existed long before the British Government established its influence in the region. However, the Sheikhdoms were somewhat backward and coloured by nomadic life. The rulers' administration was patriarchal ; they adjudicated in disputes among

⁷ Ibid, p. 26, and Al- Alkim. H., *The Foreign Policy of the UAE*, Saqi Books, Westbourne Grove (London 1989) p. 4.

⁸ Al- Baharna H., supra n. 1 p. 5; Al- Alkim. H., supra n. 7 pp. 4,5.

⁹ Al-Aydaroos. M.H., supra n. 5 p.132.

their people and disposed of their governmental functions on a personal basis.

Under British Government protection the Sheikhdoms were not fully independent of external control. For example, they had no rights to go to war independently of the British Government, nor had they the right to enter into foreign treaties, without the agreement of the British Government. They did not enjoy the internationally recognized powers of a sovereign state similar, in all respects, to those enjoyed by independent sovereign states. Moreover, the British Government exercised an extra-territorial jurisdiction over the territories of the Sheikhdoms, based upon the authority of the Foreign Jurisdiction Acts 1890 and 1913. This extra-territorial jurisdiction of the British Government restricted that of the rulers to a narrow field, i.e. only over their own nationals and the nationals of neighbouring Arab and Muslim countries. All other foreigners, including European and Commonwealth citizens over whom jurisdiction had not been transferred to the rulers, were subject to the British extra-territorial jurisdiction exercised by the British territorial court, with appeals lying to the Chief court for the Persian Gulf.¹⁰

The modern concept of judiciary came into being in the sixties. In fact, before that time the rulers of the states mostly administered justice personally in simple cases. Complicated criminal and civil disputes were often referred to a Qadi, who applied Shari'a law principles. Commercial disputes were referred to a tribunal formed of two or three known merchants who would investigate such disputes and make the appropriate recommendations, in accordance with accepted commercial rules and local custom.¹¹

In the mid-sixties the judiciary system in the states developed somewhat, especially in Abu-Dhabi, Dubai and Sharjah. This can be explained, briefly, as follows : In Abu-Dhabi, a civil court law was passed in September, 1968.¹² According to this law, the judiciary was organized, and a civil court of first

¹⁰ Al-Baharna. H., *supra* n. 1 p.17.

¹¹ *Ibid.*

¹² Official Gazette (Abu Dhabi) No. 6 Nov. 1968.

instance, together with a civil court of appeal, were constituted. In addition, the law reorganized the Shari'a courts and clearly defined their jurisdiction outside personal status matter. In Dubai, a civil courts law was passed in September 1970.¹³ Accordingly, the majority of commercial cases were transferred to civil courts. All matters not expressly transferred to civil courts continue to be within the general jurisdiction of the Shari'a courts.

In Sharjah, a civil court was set up with limited jurisdiction in commercial, labour and traffic matters.

(2) After the federation

The need to establish the UAE, after the decision of the British Government to withdraw from the region, arose not only from the inhabitants' belief in unity, but also from strategic, security, development and demographic considerations after protection ended.

Although the three years of negotiations between the seven states plus Qatar and Bahrain to establish a nine-state federal union were unsuccessful, there was an awareness, a desire and a necessity to create a federal formula among the seven emirates. Particularly, a majority of these emirates could not face the future alone, in the absence of any political and administrative organization and with the lack of a developed economic system. As a result, the institution of the federation was necessary for the Emirates: indeed it was a matter of survival.¹⁴

Thus the United Arab Emirates were formed on 2 December 1971. The first article of the Constitution, still in operation, states that "the United Arab Emirates is a sovereign independent federal state and that any independent Arab state may join the union upon the approval of the Supreme Council".

¹³ The Dubai Court Law of 1970. 23, Sept. 1970 (Dubai Official Gazette 5-31).

¹⁴ Abdullah Omran Taryem, *Taammulat Fi Waqi Wa Mustakbal Al-Imarat Al-Arabiah Al-Mutehidah* (Arabic) (Reflection on the present and future of the UAE), lectures of political symposium 15. Ministry of Foreign Affairs (Abu Dhabi 1987).

A federal system exists “when two powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each of such authorities being co-ordinated with and not subordinate to the others within its prescribed sphere”.¹⁵ This definition might be found in the provision of Articles 1 and 2 of the Constitution, where it is stated that “the union shall exercise sovereignty in matters assigned to it in accordance with this constitution over all territory and territorial waters lying within the international boundaries of the member emirates, and the member emirates shall exercise sovereignty over their own territories and territorial waters in all matters which are not within the jurisdiction of the union as assigned in this constitution”.

Article 7 states that “Islam is the official religion of the union . The Islamic Shari’a shall be the main source of legislation in the union. The official language of the union is Arabic”.

In the part dealing with freedom, rights and public duties, the Constitution declared equality among the citizens of the union before the law, it proscribed any distinction between them in regard to race, nationality, religious belief or social status,¹⁶ and it guaranteed personal liberty to all citizens. No person may be arrested, searched, detained or imprisoned except in accordance with the provisions of law. No person may be subjected to torture or to degrading treatment.¹⁷ Criminal offences and punishments must be defined by the law. No penalty can be imposed for any act of commission or omission committed before the relevant law has been promulgated.¹⁸ Furthermore it provided for the well known principle which states that penalties are personal. An accused person is presumed innocent until proved

¹⁵ Al-alkim. H., *supra* n. 7 p. 20.

¹⁶ The Constitution of the UAE, Art 25.

¹⁷ *Ibid*, Art, 26.

¹⁸ *Ibid*, Art 27.

guilty in a fair and legal trial. The accused has the right to appoint a person who is capable of conducting his defence during the trial. The law shall prescribe the cases in which the presence of a counsel for defence shall be assigned; physical and moral abuse of an accused person is prohibited.¹⁹

The Federal authorities

The Union authorities of the UAE consist of :

- 1- The Supreme Council of the union.
- 2- The President of the union and his deputy.
- 3- The Council of the Ministers of the union.
- 4- The National Council of the union.
- 5- The Judiciary of the union.

* The Federal Supreme Council (FSC):

It comprises the seven rulers of the emirates. The council is empowered to formulate policy and legislate on all matters of state including foreign affairs, defence, internal security, education, public health, immigration, housing and development.²⁰

* The President of the Union and his deputy are elected by the FSC from among its members. The vice president of the union exercises all the powers of the president in the event of his absence for any reason. The term of office of president and vice president is five Gregorian years. They are eligible for re-election to the same office.²¹

* The Federal Council of Ministers : ²² (FCM) consists of the prime minister, his deputy and a number of ministers. They are chosen by the rulers of the emirates from among citizens of the union known for their competence and experience. The FCM , in its capacity as the executive authority of the union , and under the supreme control of the president of the union and the

¹⁹ Ibid, Art 28.

²⁰ Ibid, Arts 46,47.

²¹ Ibid. Arts. 51,52.

²² Ibid. Arts. 55,56,60.

FSC, is responsible for dealing with all domestic and foreign affairs which are within the competence of the union according to the Constitution and union laws.

From its competence , the FCM initiates drafts of the federal laws and submits them to the Federal National Council before they are forwarded to the president of the union for presentation to the FSC for sanction.

* The Federal National Council : ²³ (FNC) consists of forty members. Seats are distributed to member emirates as follows : Abu-Dhabi and Dubai, eight seats each ; Ras al-Khaimah and Sharjah, six seats each ; Ajman, Fujaira and Umm al-Qaiwain, four seats each. The Constitution does not mention the method by which the members of the FNC are selected. On the other hand, it states that each emirate shall be free to determine the method of selection of the citizens representing it in the FNC. Until now, no election has taken place.

* The judiciary of the union: The Constitution states 'justice is the basis of the government. In performing their duties, judges are independent and shall not be subject to any authority but the law and their own conscience'.²⁴

The Constitution preserves the local judicial jurisdiction in each emirate in all judicial matters not assigned to the union judicature.²⁵ And it states that "the union shall have a Union Supreme court and a union primary court."²⁶

Accordingly, some emirates have not transferred their judicial jurisdiction to the federal system. This has led to the existence of a local judicial system within the federal state.

I shall deal first with the federal judiciary then with the local judiciary.

²³ Ibid, Arts. 68,69.

²⁴ Ibid. Art. 94.

²⁵ Ibid, Art. 104.

²⁶ Ibid, Art. 95.

The Federal judiciary

The federal judiciary is provided for in the Constitution of the Union as follows : ²⁷

The High Federal Court

This court is the Union Supreme Court; it was formed in 1973 and its jurisdiction is specified as covering the following matters :

- 1- Various disputes between member emirates in the Union, or between any one or more Emirates and the Union Government, whenever such disputes are submitted to the Court on the request of any of the interested parties.
- 2- Examination of the constitutionality of Union laws, if they are challenged by one or more of the Emirates on the ground of violating the constitution of the Union.

Examination of the constitutionality of legislation promulgated by one of the Emirates, if they are challenged by one of the Union authorities on the ground of violation of the constitution of the Union or of Union laws.

- 3- Examination of the constitutionality of laws, legislation and regulations in general, if such request is referred to it by any court in the country during a pending case before it. The referring court is bound to accept the ruling of the Union Supreme Court rendered in this connection.
- 4- Interpretation of the provisions of the Constitution, when so requested by any Union authority or by the Government of any Emirate. Any such interpretation must be considered binding on all.
- 5- Trial of Ministers and senior officials of the Union appointed by decree regarding their actions in carrying out their official duties on the demand of the Supreme Council and in accordance with the law related to trial of Ministers.
- 6- Trial of crimes directly affecting the interests of the Union, such as crimes relating to its internal or external security, forgery of the official records or seals of any of the Union authorities and counterfeiting of currency.

²⁷ Ibid, Art.99 and the Federal Act 10/1973. Art.33.

- 7- Cases involving conflict of jurisdiction between the Union judicial authorities and the local judicial authorities in the Emirates.
- 8- Cases involving conflict of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. The rules relating thereto are to be regulated by a Union law.
- 9- Any other jurisdiction stipulated in the constitution, or which may be assigned to it by a Union law.

The Primary Federal Courts

The Constitution states that 'the Union shall have one or more Union Primary Tribunals which shall sit in the permanent capital of the Union or in the capitals of some of the Emirates'. These courts exercise judicial powers within the sphere of their jurisdiction in the following cases :²⁸

- 1- Civil, commercial and administrative disputes between the Union and individuals whether the Union is plaintiff or defendant.
- 2- Crimes committed within the boundaries of the permanent capital of the Union, with the exception of such matters as are reserved for the Union Supreme Court under Article 99 of this constitution.
- 3- Personal status cases, civil and commercial cases and other cases between individuals which arise in the permanent capital of the Union.

The federal courts were formed in 1978, under Federal Act 6. 1978, which transferred the jurisdiction of the local courts from some Emirates to these courts. The first article of Federal Act 6/1978, states : The Union Federal Court sits in the capitals of the Emirates of Abu-Dhabi, Sharjah, Ajman, Umm al-Qaiwain and al-Fujayrah, and courts in these Emirates are considered to be Union Courts of First Instance. Other courts in the Emirates and outside the capital are considered as circuits adjunct to the court seated in the capital. Further, the article states that local courts of appeal in the capitals of these Emirates are Union Courts of Appeal.

²⁸ Ibid, Art.102.

The Local Judiciary

Some Emirates retained their local judiciary (Dubai and Ras al-Kaimah).²⁹

I shall take Dubai as an example for the local judiciary in the UAE.

There are two kinds of courts in Dubai: the Shari'a Court and the Civil Court, which are both divided into a court of First Instance and a court of Appeal.³⁰

*Shari'a Court : This court applies Islamic law, and it has jurisdiction in all matters not expressly assigned by law to the Civil Court.³¹ It has a single judge. The judgement of Shari'a Court used to be final, and was not subject to appeal until 1988. However, after the issuance of Law 3/1988 concerning the establishment of the Dubai Shari'a Court, the jurisdiction of the Shari'a Court was amended, so that an appeal could be made against a judgment from the Shari'a Court.³²

*Civil Court : The jurisdiction of the Civil Court is restricted to particular cases or matters, by decree of the ruler:³³

1- Civil or criminal cases and matters arising from them.

2- Civil and commercial transactions.

3- Matrimonial disputes, and personal affairs of non-Muslims. The civil court has jurisdiction over personal affairs, and administration of the estates of non-Muslims. Matrimonial disputes between Muslims are under exclusive jurisdiction of the Shari'a court.

The Civil Courts in Dubai are the court of First Instance, the Court of Appeal and the Supreme Court.³⁴

²⁹ Busit.O.S., *The System of Arbitration in the UAE, Problems and Prospects*, unpublished Ph.D thesis, University of Durham. 1991.p. 111.

³⁰ The Dubai Court Law of 1970. Art.3.

³¹ Ibid, Arts. 10,12.

³² Dubai Official Gazette, 1988, 167, p.7.

³³ Decree 4/1989. Dubai Official Gazette 1988,175.p.13.

³⁴ Abu-Khatwah. A.S., *Sharh Qamun Al-Ijra'at Al- Jaza'iyah Li Dowlat Al-Imarat Al-Arabia Al-Mutahidah Al-Juz' Al- Thani* Matba'at Al-Bayan (Arabic) (The UAE Criminal Penal Law part 2) (Albayan press. 1990). p. 14.

(a) Court of First Instance: This court has three divisions, each with jurisdiction over particular types of claim.

- Conciliation division, which is held by one judge and deals with small claims and minor offences, and matters arising from them.³⁵

- Ordinary division, which deals with all other civil and criminal cases not assigned to the main criminal division or the conciliation division. It is held by a single judge, but it is possible to assign two or three if the chief justice or chief judge of the civil court agree.³⁶

- Main criminal division, which is held by two or three judges; it deals with crimes involving the death penalty, or imprisonment of ten or more years.³⁷

(b) Court of Appeal: This hears appeals from decisions of all the above divisions.

(c) The Supreme Court (Court of Cassation): This was formed by the order of the ruler of Dubai (Law 1/1988 for the formation of the Court of Cassation).

It has four judges and a chief justice of the Court of Cassation.

The jurisdiction of the Court of Cassation:

1- Judgements issued by the Court of Appeal in the following areas:³⁸

- a. Claims which exceed 50,000 D.H. in value,

- b. Claims of unlimited value,

- c. If the judgement of the Court of Appeal raises new legal issues or has importance for the public. However, this jurisdiction must be by leave of the Court of Appeal. If the Court of Appeal refuses to grant leave, the case is referred the chief justice of the Court of Cassation, who has the right to refuse or accept it.

2- All criminal decisions and judgements issued by the Court of Appeal.³⁹

³⁵ a. Claim which do not exceed 1000 D.H.

b. Offences involving fines not exceeding 1000 D.H. or imprisonment not exceeding one year, or penalties which do not exceed these two punishments.

³⁶ The Dubai Court Law. Art. 15.

³⁷ Ibid. Art. 18.

³⁸ Ibid. Art .5.

3- All civil or criminal cases assigned to the court by the ruler according to Article.8 of Law 1/1988.⁴⁰

The Federal Legislation

1- A draft becomes a law after the adoption of the following procedure :⁴¹

(a) The Federal Council of Ministers prepares a bill and submits it to the Federal National Council.

(b) The FNC submits the bill to the president of the Union for his approval and presentation to the Federal Supreme Council for ratification.

(c) The president of the Union signs the bill after ratification by the FSC and promulgates it.

2- If the FNC makes any amendment to the bill and this amendment is not acceptable to the president of the Union or the FSC, or if the FNC rejects the bill, the president of the Union or the FSC may refer it back to the FNC. If the FNC introduces any amendment on that occasion which is not acceptable to the president of the Union or the FSC, or if the FNC decides to reject the bill, the president of the Union may proceed to promulgate the law after ratification by the FSC.

3- Notwithstanding the foregoing, if the situation requires the promulgation of a Union law when the FNC is not in session, the FCM may issue the law through the FSC and the president of the Union, provided that the FNC is notified at its next meeting.

³⁹ Ibid. Art.5 section 2.

⁴⁰ Ibid. Art.5 section 3.

⁴¹ Constitution. Art. 110.

Section (2) The development of the UAE Penal Procedure Law & its nature

(1) Sources of Criminal Law

Shari'a law

The main source of the UAE Penal law is the Islamic Shari'a. Article 7 of the Constitution states that "the Islamic Shari'a shall be the main source of legislation in the Union". Moreover the Penal law of the UAE 1987⁴² states that the offences which are provided in Shari'a shall be dealt with under Shari'a provisions. The offences are provided exclusively in Shari'a and they are divided into two categories: offences related to God's rights and offences related to individual rights.

It is worth mentioning that Shari'a law has existed for more than fourteen centuries and is still in force without changes or amendments to its foundations which are derived from the holy Quran and Sunna (The prophet Mohammed's sayings and doings).

Legislation

The second source of criminal law is legislation, most of which has been codified. Legislation began shortly before the establishment of the Union of Emirates in the mid sixties. Each emirate had its own penal law, some of which had the same code (Dubai, Ras al Khaimah and Umm al Qaiwain). The majority of codes were drafted by government legal advisers who were from other countries; most of them copied their own countries' law when they drafted laws. Even those who tried not to copy were obviously not familiar with the particular traditions and customs of the region. This resulted in codes of that time which were characterized by faults and contradictions.⁴³

⁴² The UAE Penal law Act 1987 Part I. Art.1.

⁴³ Busit.O.S., supra n. 29 p.91.

However, in spite of their numerous defects, they somehow filled a legislative vacuum.

The Federal Penal Law was issued in 1987. It states in the first article that “crimes and penalties should be according to this law and all provisions conflicting with its provisions are abolished”. This article gave rise to a legal argument, regarding whether, according to its provision, all provisions of the local penal law were abolished, or only such provisions as conflicted with it.

The courts reacted to this matter in two ways. The High Court of the Union stated that the article abolished only the local provisions which conflicted with the union penal law. Accordingly, other local provisions remained enforceable. Unlike the interpretation of the High Court, the Dubai Cassation Court stated that the provision of the article was general and that all offences and penalties should be according to the union penal law. Consequently, it appears from this interpretation that the provision of the article abolished all local penal laws. However, this court recently changed its opinion and adopted the High Court interpretation.

Case-law

In the UAE penal procedure decisions from courts are not generally binding in future cases. In one instance a decision may be binding, namely, when a case submitted to the High Court of the Union has similar elements to one previously decided. Then the High Court is bound by that decision. Case-law is indeed valuable when interpreting statute law.

Others

Besides the main sources of the criminal law, there are subsidiary sources stated by Article 7 of the High Court Act 1973, namely rules of custom, rules of natural law and comparative laws.

(2) Definition of Criminal procedure Law

Criminal procedure law constitutes the adjectival part of criminal law, while penal law is its substantive part. Penal provisions restrict individual conduct by defining crimes and setting up suitable punishments. Criminal procedure provisions, as adjectival provisions, restrict public authority and judges in the investigation of crimes, in the pursuit of criminals, and in judging them.⁴⁴ In other words, penal law can be defined as a law which determines and defines crimes and their penalties, while criminal procedure law regulates the means whereby penal law is enforced.

(3) The two Systems of Criminal Procedure

Two systems of criminal procedure appear to predominate in the world today: namely the Anglo-American and the Civilian. The former derives from the English Common law, the latter from Rome law.⁴⁵

Accusatorial system

In this system the parties involved in the trial are the prosecution and the defence. They are entitled to decide what evidence they will produce and elicit from the witnesses. The main functions of the judge where there is no jury are to weigh up the evidence produced by the parties, to ensure that the rules of the law are applied, and to decide on a verdict. The judge in this system does not play an active part in the trial. He basically cannot question the parties in the case or require further evidence.⁴⁶ In *Jones v National Coal Board*⁴⁷ Lord Denning described the role of the judge:

⁴⁴ Behnam. R., *Al-Ijra`at Al-Jina`iyyah Ta`seelan Wa Tahleelan* Dar Al-maarif (Arabic) (Criminal Procedures; itemization and Analysis) (Alexandria 1984) p. 5.

⁴⁵ Ibid, p. 26.

⁴⁶ Albert V Sheehan, *Criminal Procedure in Scotland and France*, Edinburgh, Her Majesty's Stationery Office, p. 177.

⁴⁷ *Jones v National Coal Board* [1957] 2 QB 55, CA.

... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate: and the change does not become him well.

The emphasis is placed on the trial itself, rather than on any pre-trial inquiries. The accused cannot be compelled to give evidence against himself, nor to be subject to any examination. Only the facts of the case and evidence may be considered when deciding on the verdict. The background and personality of the accused may be considered when deciding on an appropriate sentence .⁴⁸

The criticisms which may be levelled against the accusatorial system are that the pre-trial investigations are not sufficiently comprehensive, and that it puts the presentation of the case in court in the hands of the parties to the case. In addition, the role of the judge is restricted. All this leads to manipulation and suppression of the evidence by one of the parties.⁴⁹

Inquisitorial system

Unlike an accusatorial system, this system places the onus of eliciting the evidence at the trial on the judge rather than on the parties to the case. It gives the judge the right to discuss the evidence and he may require further evidence. He is considered an active participant alongside his role of presiding at a forensic contest between parties. Pre-trial investigations cover everything relevant to the case. The accused may be examined together with any evidence in his favour. In the interests of justice, pre-trial inquiries are made in secret in order to prevent the accused manipulating or destroying the evidence.

⁴⁸ Albert V Sheehan, *supra*, n. 46 p. 177,178.

⁴⁹ *Ibid*, p. 26.

The drawback of this system is that under it the liberty of the individual may be infringed, and the safeguards given to the defence are limited since the accused may be questioned both before and during the trial.⁵⁰

At the present time, in order to avoid the criticism against the above systems, the majority of legal systems do not apply fully either of them. Instead they take some features of both to form a new system, known to modern jurisprudence as a mixed legal system.⁵¹

(4) The nature of the UAE Penal Procedure Law

Little is known about criminal procedure in the Emirates prior to the mid-sixties. At that time, crimes were rare because of the smaller population. The rulers administered justice in person or by Qadi according to Shari'a law.⁵² The initial codification of criminal procedure was the Criminal Courts Act 1970 in Abu-Dhabi. In 1971 the Criminal Procedures (Dubai) Act (which also applied in Umm al Qaiwain and Ras al Kaimah) was issued. Recently, in 1992, the UAE Penal Procedure Act came into effect.

Most of the UAE legal system is derived from the Egyptian inquisitorial system. From the formation of the Union until now, Egyptian jurists have effectively contributed to the development of the legal system in the UAE. Accordingly the UAE penal procedure has adopted the same system.

⁵⁰ Ibid, p. 118,119.

⁵¹ Husni. M.N., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabiah (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1988, pp.45-47; Abdul Settar. F., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabiah Dar Al-nehdah Al-arabia (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1986, pp. 17,18.

⁵² See p. 9 above.

Section (3) Public Prosecution in the UAE Penal Procedure Law

(1) The general provisions

Public prosecution in the UAE penal legal system is considered a part of the judicial authority according to the Constitution⁵³ and the legislation,⁵⁴ as well as the jurisprudence of the courts. As with the judiciary, public prosecution is divided into federal public prosecution (which covers all the emirates except Dubai) and local public prosecution (which covers only the emirate of Dubai). Nevertheless, both systems have approximately the same authorities and structure, and they apply the same federal criminal law.

In federal public prosecution, the Attorney General, the advocates general and the prosecutors and agents represent and carry out the task of public prosecution before the courts, including the Federal Supreme Court. In the event of the absence of the Attorney General, or should his post become vacant, or if he is prevented from carrying out his job, his function are performed by the senior advocate general, followed by the next in seniority among the prosecution officers, who will then have all the authority of the Attorney General.⁵⁵ As regards the structure of Dubai public prosecution, the 1992 Act provides that “the public prosecution consists of an Attorney General assisted by a number of heads of public prosecution departments, prosecutors, and agents”.⁵⁶

The Minister of Justice, Islamic Affairs and Awqaf supervises and controls the public prosecution and the officers thereof. The officers of the public prosecution follow their senior officers in the hierarchy, and represent the Attorney General in carrying out their jobs. They are all subject to the

⁵³ The UAE Constitution, Art. 106.

⁵⁴ Federal Act No. 3 1983 on the Federal Judicial Authority Art. 1; the UAE Penal Procedure Act 1992, Art. 5; The 1992 Act No. 8 on the Public Prosecution (Dubai) Art. 2.

⁵⁵ See the UAE Penal Procedure Act 1992 Art 31; The 1992 Act No. 8, Ibid, Art.

⁵⁶ The 1992 Act No. 8 Art. 1.

authority of the Minister of Justice, Islamic Affairs and Awqaf.⁵⁷ The public prosecution is indivisible in its capacity as an investigative authority or prosecuting authority, and any one of its officers can replace another and continue the proceedings already started, all without prejudice to the rules of the jurisdiction.⁵⁸ It is basically and exclusively authorized to prosecute all penal actions unless otherwise provided for by the law. It prosecutes the penal action based on the investigations it conducts by itself or which are conducted by the law officers whom it may authorize, or by serving a summons on the defendant to appear before the criminal court of the respective jurisdiction to face trial in respect of the charge imputed to him.⁵⁹

The public prosecution is authorized to prosecute the criminal action, following the instituting thereof, up to the stage of the final process. This involves: a) the presentation of the action before the judiciary at the different stages of the proceedings.⁶⁰ b) The prosecution officer, present at the hearing, submitting his requests and pleadings,⁶¹ c) appearing in any appeal against the judgements issued by the respective judicial part, as based on the merits of the case or on legal causes, according to the proceedings and restraints stipulated by the law.⁶² The right of the public prosecution to prosecute criminal actions is established, even though the law, in exceptional cases, permits other parties to institute an action.

When the public prosecution exercises its jurisdiction as regards penal actions, it proceeds therein in its capacity as representative of the people, whose interests it represents. It only seeks to implement the requirements of the law and to achieve justice. For this reason, even though the public prosecution is considered as the litigant in the penal action, its role in the

⁵⁷ Federal Act No. 3 Art. 56.

⁵⁸ Federal Act No. 3 Art. 57.

⁵⁹ Ibid.

⁶⁰ The UAE Penal Procedure Act 1992, Art. 7.

⁶¹ Ibid, Art. 162.

⁶² Ibid.

litigation should be characterized as being to act justly and honestly in the public interest. It may be permitted or rather required to plead the innocence of the defendant during the hearing of the action, if it is found that the charge imputed to him is baseless. This is particularly so in view of the characteristic of its special legal position in respect of appealing against judgements. Accordingly, it may appeal against judgements, even though the purpose of its appeal may be to the benefit of the defendant alone.⁶³

The public prosecution, in addition to its basic powers, exercises others, some of which are explicitly provided for by the law, and some of which are granted to it on the basis of the nature of its position and legal structure, through its link with the administrative authority. The most important of these are the following:

1. Supervision of the prisons and places where the penal judgements are executed.⁶⁴
2. Supervision of officers dealing with court funds.⁶⁵
3. Carrying out its role in executing the judgements issued in respect of penal actions.⁶⁶
4. Mandatory and facultative intervention in lawsuits and appeals instituted before the Federal Supreme Court in respect of penal actions.
5. Attending the general meetings of the courts and expressing its points of view in matters relevant to the work of public prosecution.
6. Submitting cases in which a sentence of death has been pronounced to the Federal Supreme Court (Penal Appeal Circuit), according to the proceedings provided for by the law.

⁶³ Ibid, Arts. 230, 244.

⁶⁴ Ibid, Art. 244.

⁶⁵ Ibid, Art. 6.

⁶⁶ Ibid, Art. 305, 306.

7. Prosecuting disciplinary actions against judges and members of the public prosecution before the disciplinary council.⁶⁷
8. Prosecuting disciplinary actions against lawyers.

It may also contribute, by the use of force if necessary, to the execution of judgements issued by the courts in respect of actions other than penal ones.

(2) The powers of the Attorney General

The Attorney General presides at the top of the hierarchy of the public prosecution, and he represents the people in prosecuting penal actions. Generally, the powers and jurisdiction of the Attorney General include both investigation and prosecution and cover all the seven Emirates in the UAE in respect of crimes that impinge on the interest of the Federation, as well as covering the territorial scope of the federal judiciary in respect of other crimes.⁶⁸ He supervises the affairs of the public prosecution and presides judicially and administratively over all its members of all ranks, with the power to issue the necessary directives and circular letters to regulate their work in both aspects.

The Attorney General has extraordinary authority granted to him exclusively in respect of prosecuting penal actions which he carries out himself without any participation from any other officers of the public prosecution, except by means of his special authorization. These exceptional authorities are as follows:

- a) To prosecute penal actions before the Federal Supreme Court in its capacity as a state security “trial court”.
- b) To appeal for cassation in favour of the law, in the final judgements issued by the federal court, without observance of specific time limits for appeal.

⁶⁷ Ibid, Art. 272.

⁶⁸ Federal Act No. 3 Art. 42.

The Attorney General decides to appeal on his own initiative or upon a request from the Minister of Justice.⁶⁹

- c) To submit a request to obtain the permission of the disciplinary council, specified in the law on judicial authority, for the arrest of a judge or a prosecution officer, or to put them in preventive custody, in cases where they are caught red-handed in a crime. Also to request the permission of the said authority to undertake any other investigative procedure besides arrest and preventive detention in cases other than those where the officer is caught in the act.
- d) To request the formation of a court which will hear and issue judgements in crimes committed by a judge or a public prosecution officer which are not related to their job.

The Attorney General has further extraordinary authority which does not relate to penal actions, although it is relevant thereto in one aspect. These powers are as follows:⁷⁰

- a) To prosecute disciplinary actions against judges and the officers of the public prosecution at the request of the Minister of Justice.
- b) To request that a judge or a prosecution officer be suspended from his office during an investigation before the committee from which the disciplinary council is formed, or during the course of his trial in respect of a crime that he has committed.
- c) To appeal in favour of the law in final civil judgements issued by the federal court, within two years maximum, according to the methods stipulated by the law, whether on his own initiative, or upon a request from the Minister of Justice.

⁶⁹ Ibid, Art. 65.

⁷⁰ The UAE Penal Procedure Act 1992 Art. 256.

(3) The authority of the public prosecution officers⁷¹

1. The advocates general and the heads of the prosecution departments, each within their own jurisdictions, exercise all the ordinary powers granted to the Attorney General in prosecuting a penal action. This they do through their investigative activities pre-trial, and virtue of their role in criminal trials, representing the prosecution before the court, by submitting pleadings and appeals against judgements and the like.
2. The advocates general and the heads of prosecution departments may perform any act which falls within the extraordinary jurisdiction of the Attorney General by means of a special authorization from him in respect of such an act.
3. The advocates general and the heads of prosecution departments carry out their duties under the supervision and control of the Attorney General. They exercise the right to control and supervise prosecution officers within their territorial jurisdiction. The most important characteristic of the public prosecution is that it is established with a specific scope on the basis of a system of progressive subordination.
4. The heads of prosecution departments participate with the advocates general in the function of representing the prosecution before the Federal Supreme Court, and of signing appeals for cassation. As regards representing the prosecution in hearings of the disciplinary courts held for judges and prosecution officers, this should be undertaken by those whose ranks are not inferior to that of an advocate general.
5. The prosecutors and the prosecution agents exercise all the ordinary powers in prosecuting penal actions in the same way as the advocates general and the heads of the prosecution departments (whose powers are mentioned in sections (1) and (2) above) under their supervision and control according to what is mentioned in section (3). The authority of the

⁷¹ The Attorney General's Order No.12, 1988 on the Instructions and the General Principles related to Judicial office in the Public Prosecution.

prosecutors and the prosecution agents does not differ from that of the advocates general and the heads of the prosecution departments, with the exception of those powers mentioned in the previous section.

(4) Division of work among the prosecution officers⁷²

Work is divided among the public prosecution officers as follows:

The advocate general

The advocate general or his representative examines and takes action in the following cases:

1. Cases of homicide, attempted murder, narcotics offences, bribery and forgery of official documents.
2. Cases of exhumation of bodies before proceedings are undertaken.
3. Cases where it is decided to accuse an informer of making false accusations, before taking action in the case.
4. Requests to obtain copies of the verbal process and the criminal investigations from the authorized parties.
5. The sending of the monthly and annual records to the different prosecution departments, and the referral of cases involving inspections to the technical bureau according to the directives from the Attorney General.
6. Service of notices to officers of the armed forces, when any of their members are involved in criminal acts.
7. Complaints and investigations involving officers of the criminal investigations department which involve their work performance.
8. Misdemeanours and contraventions which are required to be filed for record, due to their lack of importance, with the pleadings justifying such filing.

⁷² Ibid.

Heads of the public prosecution departments

The heads of the public prosecution departments undertake the following responsibilities:

1. Allocating work among the public prosecution officers who are subject to their authority.
2. Fixing work rotas for the prosecutors, including responsibility for inspecting the scenes of crimes.
3. Visiting the different prosecution departments to inspect the progress of their work and preparing a report thereon in which they include their observations, and sending a copy of the report with the proposals to the technical bureau of the Attorney General.
4. Visiting the scene of the crime in important cases and supervising the investigation on site.
5. Reviewing the records of hearings and cases in which judgements were issued, and the required appeals.
6. Disposing of seized and acquired objects according to the directives from the Attorney General.

Head of the appeal prosecution

The head of the appeal prosecution is authorized to carry out the following:

1. To receive all the appellate reports from the prosecution departments within his jurisdiction.
2. To review all appealed cases, with their attached reports and pleadings, one week at least before the date of the hearing thereof.
3. To represent the public prosecution before the courts of appeal, in the hearings of penal actions, and submit pleadings which include the point of view of the public prosecution in respect of the cases being heard.
4. To review the hearings records, and the judgements issued by the Court of Appeal, and prepare appeals for cassation in respect of them according to the provisions of Law no. 17 of 1978.

5. To investigate the complaints offered by advocates in accordance with the provisions of the law regulating the legal profession, and prepare a memorandum of his point of view thereon.

The prosecutors

The prosecutors and public prosecution agents are authorized to carry out the following:

1. To investigate and take action in the cases referred to them by the police, according to the division of work between them.
2. To visit the scene of the crime to carry out investigations there.
3. To represent the public prosecution before the courts.
4. To exercise any other authority provided for by law.

(5) Relationship of public prosecution to the police

The UAE Penal Procedure Act 1992 divides the police force into two parts in respect to their duty:⁷³ the administrative police and the judicial police. The role of the administrative police is limited to keeping peace and public order. The administrative police exercise a protective role which exists prior to the commission of crime,⁷⁴ for example, police patrol and verification procedures such as stoppage. The law calls them “public authority persons”. According to this, all members of the police are administrative “public authority persons” since they are entitled to exercise a protective role. Unlike the administrative police the judicial police are defined by the law and are considered an assistant body to the judiciary. Their duty arises after the

⁷³ The police ranks in the UAE are divided into three classes. 1- low class: comprises policemen. 2- middle class: comprises noncommissioned officers; a) corporal b) sergeant c) adjutant. 3- high class: police officers from the rank of second lieutenant to the rank of major general.

⁷⁴ Mahdi. A., *Sharh Al-Qawa'id Al-Ammah Lil Ijra'at Al-Jina'iyyah Al-Juz' Awwal* Dar Al-nahda Al-arabiah (Arabic) (Explanation of the General Principles of the Criminal Procedure part 1) (Cairo 1995) p. 127.

commission of crime, to investigate it, search for the criminal and collect information and evidence requisite to inquiry and indictment.⁷⁵

This duty of judicial police officers sometimes, exceptionally, entitles them to exercise inquiry procedures such as arrest and search without warrant. Therefore, judicial police officers should be defined by law since they have the power to interfere with an individual's liberty.

Article 33 of the UAE Penal Procedure Act 1992 states that judicial police officers are:

- 1) public prosecution officers.
- 2) Police officers, non-commissioned officers, policemen.
- 3) Officers and non-commissioned officers of border guard.
- 4) Migration officers.
- 5) Those officers of ports and airports who are police officers.
- 6) Officers of the civil defence.
- 7) Inspectors of municipalities.
- 8) Inspectors of social affairs and labour.
- 9) Inspectors of the Ministry of Health.
- 10) Employees who are judicial police officers in accordance with any enacted laws, decrees or orders.

In addition, Article 34 of the UAE Penal Procedure Act 1992 states that "According to a decision by the Minister of Justice and with the agreement of the competent minister or the competent authority, certain officials may be authorised to act as judicial police officers concerning crimes that occur within their jurisdiction and related to their duties".

Article 33 (2) of the 1992 Act makes all members of the police judicial police officers; this can be criticized because judicial officers should have a certain amount of experience to entitle and enable them to carry out their job in a proper way. A mere policeman does not necessarily have the experience

⁷⁵ The UAE Penal Procedures Act 1992, Art. 35.

to equip him to carry out inquiry procedures which often interfere with individual liberty.⁷⁶

On the other hand, the 1992 Act mentions public authority persons to whom it grants less powers than judicial officers.⁷⁷ The question now is: who represents public authority persons when Article 33(2) makes all police members enjoy the capacity of judicial police officers? Public authority persons should be distinguished from judicial police officers. A judicial police officer should be at least of the rank of non-commissioned officer in order to be able to exercise his duty, and the lower ranks of the police should count only as public authority persons.

This view can be strengthened by the provision of Article 7 (a) of the Union Act 1976 No.2 relating to security and the police force; it states “that judicial police officers in their jurisdiction are police officers and non-commissioned officers till the rank of sergeant.”⁷⁸

It is worth noting that paragraphs 7, 8 and 9 need not be mentioned in Article 33 because these paras are found in the provision of Article 34, where it speaks of judicial police officers with jurisdiction being limited to particular offences related to their duties.

(6) Duties of Judicial police officers under the UAE Law

The UAE Penal Procedures Act 1992 Article (30) states that a judicial police officer is charged with investigation of crimes, searching for offenders and collecting information and evidence needed for inquiry and charge. The duties of a judicial police officer can be divided into two categories:

⁷⁶ Husain, J., *Al Wajeez Fi Sharh Qanun Al-Ijra`at Al-Jaza`iyyah Li Dowlat Al-Imarat Al-Aarabiah Al-Mutahidah Al Juz`Al-awwal* Mattabie Al-baian Al-tijariah (Arabic) (Explanation of the UAE Penal Prosedures Law) part I Al-bayan Press (Dubai 1994) pp. 254-255.

⁷⁷ Article 49 of the UAE Penal Procedure Act 1992, for example, provides that “in the event of red-handed felonies or misdemeanours not punishable by a fine, the public authority persons may arrest the accused and hand him over to the nearest judicial police officer”.

⁷⁸ This view is adopted by the Union Supreme Court (see cassation 12, year 8, 24/12/1986); under the Egyptian Criminal Procedures Law all police ranks are judicial officers except ranks below sergeant whom the law considers as assisting to the judicial officers (Art. 24).

1) Receiving complaints and information about crimes. This is one of the primary duties of the police. Article (35) of the UAE Penal Procedures Act 1992 provides that “judicial police officers should receive complaints and information about crimes....”

It is worth mentioning that under UAE law informing the police or prosecution authorities of crimes is a duty which rests upon individuals, whether these be private citizens or public servants, and refusal to do so could constitute an offence.⁷⁹

Article (37) of the UAE Penal procedures Act provides that anyone with knowledge of the commission of an offence which requires public prosecution, without complaint or demand from other persons, should at once report it to the public prosecution authorities or to the nearest judicial police officer. As regards public servants, Article (37) of the same act provides that any public servant or person commissioned to a public service knowing about the commission of an offence, during his duty or due to it, which requires public prosecution, without complaint or demand from other persons, should at once report it to the public prosecution authorities or to the nearest judicial police officer.

2) Detecting crimes. After receiving complaints or information about a crime the police should seek to find out further information from any sources in order to reveal that crime and arrest the offender.

The police are entitled to execute any procedure in order to detect crimes provided that their procedures do not interfere with individual liberty and are in accordance with the law.⁸⁰

⁷⁹ The UAE Penal Act 1987 makes failure to inform about crimes whether by a private person or by a public servant an offence. Regarding a public servant, Article 272 provides that any public servant, charged with searching crimes, who neglects or delays to inform of an offence which has reached his knowledge is liable to punishment by detention or fine. In respect of a private person, Article 274 of the 1987 Act makes his abstention an offence which is punishable by a fine not exceeding one thousand dirham.

⁸⁰ The UAE Penal Procedures Act 1992, Art. 35.

Ordinary powers of judicial police officers

The UAE Penal Procedures Law grants judicial police officers several powers regarding the investigation of crime. Most of these powers constitute no infraction of the individual's rights or liberties. These powers are:

1) Taking the statements of suspected persons and witnesses. Judicial police officers whilst collecting evidence are entitled to listen to witnesses and question the suspected person⁸¹ in general about the alleged offence, but without dealing with other details, which could be considered an interrogation outside police powers.⁸² Where the offence is in progress a judicial police officer has the right to prevent any person leaving the scene of the offence until initial inquiries are completed.⁸³ Moreover, where an offence is in progress a judicial police officer can ask anyone whom he believes to have any information regarding the alleged offence to answer his questions or attend a police station.⁸⁴ If the person refuses to submit to the judicial officer, he may record this in his verbal report and that person, after his plea is heard, could be punished by a fine not exceeding five hundred dirhams.⁸⁵

Except where an offence is in progress, a judicial police officer has no power to oblige any person to answer his questions or to attend a police station in order to give a statement, or to submit to any procedure, and the officer cannot issue a warrant to arrest a person who has ignored the officer's request. Issuing an arrest warrant is an inquiry procedure which is in the power of a prosecutor or a judge.⁸⁶

⁸¹ Ibid, Art. 40.

⁸² See below 'powers of judicial police officer under delegation.'

⁸³ The 1992 Act, Art. 44.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Except when an offence is in progress and an accused person is not at the scene of the crime; then a judicial police officer in this case is entitled to issue a warrant to arrest him (Art 45 of the 1992 Act).

2) Seeking for assistance from experts. A judicial police officer may ask for doctors or other experts in any field to help him in his inquiries. He may ask them for their opinions which can be given either orally or in writing.⁸⁷

3) Keeping a record of an investigation. All procedures which are carried out by a judicial police officer during the investigation of crimes must be kept in a record signed by him and other parties, whether suspects, witnesses or experts.⁸⁸ These records should be sent to the competent prosecutor together with any articles related to the offence. It is up to the competent prosecutor's discretion whether or not to prosecute according to the police record.⁸⁹

Exceptional powers of a judicial police officer

The UAE Penal Procedures Act 1992 grants a judicial police officer exceptional powers in limited cases. These are actually considered to be inquiry powers, such as those of arrest and search without warrant which are primary and outside police powers as was stated above. The cases where a judicial police officer can execute inquiry procedures are stated exhaustively in Article (45) of the 1992 Act, which deals with arrestable offences, as will be seen later.

It is worth noting that though the law in such cases grants the judicial police officer powers of inquiry, his procedures regarding these powers are still within the scope of detection procedures.⁹⁰ Accordingly, these procedures do not initiate a criminal legal action as they would if they were carried out by a prosecutor. But if a judicial police officer executes the above procedures in accordance with powers delegated to him by a prosecutor, in

⁸⁷ The 1992 Act, Art. 40

⁸⁸ Ibid, Art. 36.

⁸⁹ See the Circular of the Dubai Attorney General concerning principles controlling public prosecution work, No. 3, Art. 7; see also the UAE Attorney General's Order No.12, 1988 on the instructions and the general principles related to judicial functions in public prosecution, Art. 117.

⁹⁰ See Mahdi. A., *supra* n. 73 p. 158.

such a case these procedures are considered inquiry procedures which could initiate a criminal legal action.⁹¹

As regards the relationship between the police and the public prosecution, police officers are subject to the authority of the Attorney General in investigating crimes, searching for the perpetrators thereof, and gathering the necessary evidence for investigation and prosecution: all this within the framework of their duties. The Attorney General has the right to supervise them in respect of such duties.⁹²

A judicial police officer should report all cases to the public prosecution which has the authority to determine whether or not to prosecute. A public prosecutor in charge of the case investigates it and may order the police to provide him with further information, to which request police should comply.⁹³

Delegated powers

A public prosecutor who is in charge regarding a particular offence may delegate to a judicial police officer the duty of carrying out of some inquiry procedures in connection thereto.

Inquiry procedures which are carried out by a judicial police officer in accordance with a delegation from a competent prosecutor are considered as if carried out by the prosecutor himself.⁹⁴

The general principle is that inquiry procedures should be carried out only by a public prosecutor. However, the law allows the public prosecutor to delegate to another prosecutor or even to a judicial police officer the carrying out of inquiry procedures on his behalf where these are needed in the interests of an inquiry.

⁹¹ Ibid; see below 'powers of judicial police officer under the delegation'.

⁹² The 1992 Act, Art. 31.

⁹³ Ibid, Art. 36.

⁹⁴ Husain. J., *supra* n. 75 p. 325.

A public prosecutor may commission a judicial police officer to carry out a specific inquiry procedure, with the exception of the interrogation of an accused; where it is necessary to carry out procedures outside his jurisdiction, a public prosecutor may delegate another prosecutor or a judicial police officer to act on his behalf. The person delegated, within the limits of the delegation, has the same powers as the prosecutor.⁹⁵

Whenever a prosecutor delegates to a judicial police officer the carrying out of an inquiry procedure the prosecutor is obliged to specify the cases which need inquiry and the procedures to be carried out. Where time is short the one delegated may execute any inquiry procedures, even interrogation of the accused where necessary to disclose the truth.⁹⁶

Conditions of delegation

1. A public prosecutor, in order to be entitled to delegate a judicial police officer to inquire into an offence, should himself be competent to inquire into that offence. For example, if the offence is beyond his jurisdiction and there is no necessity to empower him to deal with the offence where he initially has no power of inquiry, such as an offence punishable by death or life imprisonment, only heads of the public prosecution or higher officers are entitled to inquire into it.⁹⁷
2. Delegation from a public prosecutor is permitted only to judicial police officers, not to other police members. Accordingly, if a public prosecutor issues a delegation warrant to any public authority person that delegation is illegal.⁹⁸
3. Delegated judicial police officers should have territorial jurisdiction covering the offence subject to that delegation. The name of a delegated police officer does not need to be mentioned in the writ of delegation. The mere mentioning of the nature of the duty of the office is enough to entitle

⁹⁵ The 1992 Act, Art. 68.

⁹⁶ Ibid. Art. 69.

⁹⁷ Husain.J., supra n. 75 p. 322.

⁹⁸ Ibid.

anyone subject to that duty to exercise the procedures stated in that writ. However, if the delegation writ states an officer by name nobody except that officer may execute the procedures in that writ.⁹⁹

4. Any inquiry procedure, except interrogation of an accused, may be subject to delegation.¹⁰⁰ The reason for this exception obviously, arises from the gravity of interrogation as this could lead to confession, which should be surrounded by specific safeguards. Nonetheless, UAE Law permits delegation of interrogation in a situation where time is short and interrogation is necessary to disclose the truth. The question arises as to what the criteria are by which one can say that time “is short”, and by which an interrogation is necessary to “disclose the truth”. UAE Law says nothing regarding this, and not even one court decision dealing with such provision can be found. We may say, regarding the time, that it is for the judicial police officer to decide whether or not the time is about to pass, and that there is no fear of the abuse of his power since all his decisions are under the supervision of the prosecution and the scrutiny of the competent court. However, the issue does arise in respect of the discretion of a judicial police officer to decide whether or not interrogation is necessary to “disclose the truth” and, accordingly, he is entitled to interrogate the accused. I find myself disagreeing with the term since, in my opinion, almost all inquiry procedures are necessary to disclose the truth, especially interrogation, by which a judicial police officer could extract an accused’s confession in the absence of safeguards which are provided in interrogation by a prosecutor.
5. Delegation is unlawful where it grants a judicial police officer the right to inquire about the whole case. This is considered an abandonment of inquiry authority to the police officer, which is unlawful.¹⁰¹

⁹⁹ Ibid.

¹⁰⁰ The 1992 Act, Art. 68.

¹⁰¹ Husain .j., *supra* n. 75 p. 323.

6. The procedures which are delegated should be specified; mere submission of a case from a prosecutor to the police in order to carry out further investigation is not considered a delegation.¹⁰²
7. A delegation warrant should be issued in writing and before being acted upon. It should be dated and signed by the issuer, mention the job of the delegated officer, the name of the accused and the nature of the alleged offence.¹⁰³

Powers of judicial police officers under the delegation

The general principle is that the delegated police officer has the same powers as the prosecutor, within the scope of the delegation. Therefore, a judicial police officer when exercising his powers under the delegation should consider the following points:

1. He should observe the limits of the delegation, otherwise his procedures may be unlawful. For example, if the delegation warrant requires a judicial police officer to search an accused person, the officer has no power under that delegation to search the accused's premises.¹⁰⁴
2. He should observe the period of the delegation warrant, if it contains such a period. Where a delegation warrant has no expiry date a judicial police officer can rely on it while the case is under the competence of the prosecution. Once the case ceases to be under the competence of the prosecution because it is submitted to the court, the delegation warrant ceases to be valid.¹⁰⁵
3. A delegated officer has no power to sub-delegate his duties to another officer, unless such a power is contained in the delegation warrant.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid, p. 326.

¹⁰⁵ Ibid; see *Majmu'at Ahkam Muhkamat Al-Naqd Al-Masriah* (Arabic) (The Egyptian Digest of the Decisions of the Court of Cassation), cassation No. 7, 2 January 1963, p.31. (The Egyptian Digest of the Decisions of the Court of Cassation is referred to throughout as "E.D.D.C.C.")

Moreover, where the name of a specific judicial police officer is stated in a delegation warrant no other officer can act in accordance with that warrant, even if he has the same duty.¹⁰⁶

4. When exercising his power under a delegation warrant, a judicial police officer is obliged to prepare a verbal report containing all the procedures he has adopted and whatever articles he has seized. As procedures carried out by a judicial police officer under a delegation warrant are inquiry procedures, the officer has to be accompanied by a clerk to record the verbal report.¹⁰⁷

The Attorney General is responsible for the investigation of crimes. So when a judicial police officer is alleged to be guilty of misconduct or breach of his duty regarding investigation of crimes, the Attorney General is responsible and he may require the officer's department to look into that matter and / or to take disciplinary proceedings against him without prejudice to the right to institute a criminal action.¹⁰⁸

¹⁰⁶ Husain.J., *supra* n. 75 p. 329.

¹⁰⁷ *Ibid*; Mahdi. A., *supra* n.73 p. 355.

¹⁰⁸ The 1992 Act, Art. 32.

Arrest and Similar Procedures

Arrest and Similar Procedures

2

Arrest is considered one of the most important procedures which can be carried out during pre-trial investigations.

Pre-trial investigation is the means whereby crimes are unveiled and criminals detected. It is the basis for subsequent inquiries. On the other hand, it often conflicts with individual rights and liberties. Consequently, modern criminal procedure laws contain provisions regulating this stage, including its scope, duration and persons who are entitled to carry it out. This is in order to maintain a balance between two conflicting interests, namely the interest of the state to keep society secure by fighting crime and pursuing criminals, and the interest of the individual to exercise his rights without disturbance.¹

The procedures which most infringe the individual's rights are arrest, search and preventive detention. This study will be limited to one of these procedures, namely arrest which indeed needs deep scrutiny to remove its vagueness, particularly as regards the UAE penal procedure law, a recently introduced code. The study will be a comparison between two different legal systems: the accusatorial system represented by English law and Scottish law, and the inquisitorial system represented by the Egyptian law and the UAE law. This chapter deals with the definition of arrest and procedures similar to it.

¹ Abu-Khatwah. A.S., *Sharh Qanun Al-Ijra`at Al- Jaza`iyyah Li Dowlat Al-Imarat Al-Arabia Al-Mutahidah Al-Juz` Al- Thani* Matba`at Al-Bayan (Arabic) (The UAE Criminal Penal Law part 2) (Albayan press. 1990). p.8,9.

Section (1) Definition of Arrest

It is worth first noting that none of the criminal procedure legislation we will deal with includes a definition of arrest. Definitions must be found in court reports or in the opinions of jurists.

The Egyptian Criminal Procedure Act 1950 gives no definition of arrest. According to the Egyptian Cassation Court, arrest is “holding a person bodily, restricting his movement and depriving him of his liberty in order to carry out some procedures against him”.²

The UAE Penal Procedure Act 1992 entitles the police and prosecution to arrest a person in particular circumstances. However, it follows Egyptian law in containing no definition of arrest.

In England,³ since the passing of the Police and Criminal Evidence Act 1984 which deals with arrest, it has been possible to define arrest as “the apprehending or restraining of a suspected person in order to detain him at a police station while the alleged crime is investigated and in order that he be able to answer for an alleged or suspected crime.”⁴

In Scotland, the definition of arrest could be derived from the decision of *Swankie v. Milne* Lord Cameron, in distinguishing between arrest and detention, stated that arrest is “a legal act taken by officers of the law duly authorised to do so and while acting in the course of their duty, carrying with it certain important legal consequences”.⁵

² E.D.D.C.C. Cassation 20, 71, 9 June 1969, p. 583.

³ For a discussion of the meaning of arrest and a statement of the old law, see H Levenson *The concept of arrest* March 1981 LAG Bulletin 58-62.

⁴ Bevan and Lidstone, *The Investigation of crime: A Guide to Police Powers* (2nd edn Butterworths 1996) p. 238.

⁵ *Swankie v. Milne* 1973 J. C. 1.

Unlike Egyptian law and UAE law under which powers of arrest are governed only by statutes, under English law and Scottish law such powers are governed by both statute and common law.

From examination of the four systems regarding arrest we can give a general definition of arrest thus: “arrest is depriving a person of his liberty by restraining him in order to carry out some proceeding in a suspected or alleged crime”.

Arrest is carried out when a crime has been committed or is being committed and there are reasonable grounds or sufficient evidence that a specific person has committed it. Therefore, we can state generally that where there is no evidence of a committed or attempted crime there is no reason for arrest.

What constitutes arrest

Where any procedure carried out by the police could interfere with an individual's rights, it is necessary for the person under that procedure to know the nature of it, in order to defend himself against any unexpected consequences. This strongly applies to arrest as it is the most restrictive procedure effecting an individual's liberty.

Egyptian Law and the UAE Law

The judicial and jurisprudential definitions of arrest show that arrest is a compulsory procedure carried out against the will of the arrested person and prejudices his liberty. However, arrest is a temporary procedure, and it should be terminated either by releasing the person or by substituting it for another procedure, namely, detention pending investigation.

In accordance with the above, one can deduce three characteristics of arrest under Egyptian law and UAE law:

- 1) Compulsion. Arrest as an inquiry procedure contains an element of compulsion which arises from two points. First, arrest is often executed without the consent of the accused and against his will, and he has no choice but to submit to it. Second, in order to execute arrest a police officer is entitled to use force in cases where the arrest is resisted by the accused or he is likely to abscond.⁶ Of course, compulsion is not always used to execute an arrest as arrest is often executed by informing a person that he is under arrest and should submit to that situation.⁷ Although a police officer may sometimes exercise a procedure similar to arrest, it does not constitute arrest, because it contains no compulsion. For example, a summons issued by a prosecutor or a judge. This is merely an invitation to a person to attend at a particular date and place, not giving the officer who possesses it the right to force the wanted person to submit to it. And stoppage, which will be discussed later, is merely an investigative procedure granted to the police to entitle them to identify persons and ask them ordinary questions without interfering with their personal liberty. These two procedures carry no compulsion, and they do not constitute arrest.⁸
- 2) Arrest is a temporary procedure. Basically, arrest in its nature is an interim procedure executed in order to keep an accused person available to the prosecution or a court, or to carry out further procedures against him. Moreover, arrest is an inquiry procedure which is generally terminated by committing the case to a competent court.⁹

Both Egyptian criminal procedure law and UAE Penal procedure law limit the period of arrest, either by police or the prosecution.

⁶ Al-Mohannadi. H., *Al-Qabdh Ala Al-Muttaham Fi Al-Qanun Al-Misri* (Arabic) (Arrest of an accused person under Egyptian law) LLM thesis the University of Cairo 1993, p. 26.

⁷ Abu Aa`mer. M. Z., *Al-Ijra`at Al-Jina`iyah Criminal Procedures* Dar El matpuaat El jamieah (Arabic) (Criminal Procedure) Acadimic Printing House (Alexandria 1984) p. 225.

⁸ Al-Mohennadi. H supra n. 6 p. 27.

⁹ Ibid, p. 33; Husni. M.N., *Sharh Qanun Al-Ijra`at Al-Jina`iyah* Dar Al-nehdah Al-arabiah (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1988 p. 556.

The Egyptian Criminal Procedure Act 1950 Article (36) dealing with arrest provides that a judicial police officer, after arresting the accused person, should immediately take his statement and, where the accused person fails to prove his honesty, the judicial police officer should send him to the competent prosecutor within twenty-four hours. The prosecutor should interrogate him without any delay and after that the accused person should be released or re-arrested.

Article (47) of the UAE Penal Procedures Act 1992 is similar to Article (36) of the Egyptian law. However, it gives the police wider authority in regard to the arrest period. The police are entitled to hold the person arrested for up to forty-eight hours before taking him to the competent prosecutor. The prosecutor, after interrogating the accused, should release or re-arrest him within twenty-four hours.

One wonders why the legislator of the UAE did not adopt the same period of arrest in police hands as is provided for in Egyptian law. This expansion of the arrest period in the hands of the police in my opinion has no justification, especially when the safeguards of the arrested person in police hands are less than when he is in the hands of the prosecution. Moreover, some voices among the Egyptian jurists maintain that the period of arrest in the hands of the police should be reduced to four hours, in order to avoid undue imposition upon an individual's liberty.¹⁰

3) Infringement of an individual's liberty. A person under arrest loses his freedom to move at his will, his movement being restricted by the arrest, whether by the police or prosecution. From this, two facts emerge: one, that arrest can be executed only against a natural person; with a legal person such as a firm or a company, arrest is not possible. The second fact is that procedures which contain no infringement on the individual's personality, such as summons and stoppage, do not constitute arrest.¹¹

¹⁰ Al-Marseffawi. H. S., *Huqwaq Al-Insan Fi Al-Ijra`at Al-Jina`iyyah Fi Al-Nedham Al-Qanuni Al-Misri* (Arabic) (Human Rights in Criminal Procedure under the Egyptian Legal System 'pretrial stage' Second Conference of the Egyptian Section of the A.I.D.P, 1989) p. 61.

¹¹ Al-Mohennadi. H supra n. 6 p. 40.

English Law

Arrest exists where a person is restrained by force, such as a constable holding his arm or by symbolic restraint, such as a constable putting his hand on his shoulder and indicating that the person is not free to go. Arrest could occur also where a constable merely tells a person that he is under compulsion to remain where he is or to accompany him to a police station, or merely tells him that he under arrest.¹²

However, expressions which do not contain the word 'arrest' and do not carry the implication of compulsion do not constitute an arrest. In *Alderson v. Booth*¹³ a police officer told the defendant "I shall have to ask you to come to the police station"; the Divisional Court held the magistrates were entitled to hold that these words did not constitute an arrest because they would not have brought home to the accused unequivocally that he was under compulsion.

Where an arrested person is incapable of understanding what a police officer is saying to him, for example if the person is deaf, or cannot understand English, or he is drunk, the police officer in order to effect arrest in this case is obliged to do what is reasonable.¹⁴

The 1984 Act provides that, where the arrest is made by physical seizure, the arrest is not lawful unless the person is told of the fact of arrest; it states that where an arrest is made without the person being informed that he is under arrest, the arrest is not lawful unless he is informed as soon as practicable after the arrest.¹⁵ Moreover, the 1984 Act requires the constable to inform the person in such a case even when it is obvious that he has been arrested.¹⁶

¹² David Barnard, *the Criminal Court in Action* (3rd edn London, Butterworths, 1988) p. 51.

¹³ *Alderson v Booth* [1969] 2 All E R, 271, D C.

¹⁴ Bevan and Lidstone *supra*, n. 4 p. 284.

¹⁵ The Police and Criminal Evidence Act 1984 section 28 (1).

¹⁶ *Ibid*, section 28 (2).

Scottish Law

In Scotland it seems that there are as yet no sharp criteria to define the elements which constitute arrest. However, there are court decisions from which one could elicit guidance to help in this matter:

Lord Cameron in *Swankie v. Milne*¹⁷ tried to distinguish between arrest and detention when he stated :

An arrest is something which in law differs from a detention by the police at their invitation or suggestion. In the latter case a person detained or invited to accompany police officers is, at that stage, under no legal compulsion to accept the detention or invitation. It may well be that in a particular case refusal to comply could lead to formal arrest, but until that stage is reached there is theoretical freedom to exercise a right to refuse to accept detention at the hands of police officers who are not armed with a warrant. I think it is important always to keep clear the distinction between arrest, which is a legal act taken by officers of the law duly authorised to do so and while acting in the course of their duty, carrying with it certain important legal consequences, and the mere detention of a person by a police officer.

First, it is worth noting that detention mentioned in this case is different from detention under the Criminal Procedure Act 1995 because the latter is statutory, unlike the former which is merely an ordinary procedure available to the police in order to enforce their duties and not binding in general.

What might be deduced from that judicial opinion is that arrest is a legal action resulting in a legal consequence and its important feature is that the act is carried out by way of compulsion.

The belief of the person who executed the arrest, and that of the person arrested, affects what constitutes arrest. This is what was argued in *Wither v. Reid*.¹⁸ In this case, the respondent and others were suspected by the police of being in possession of drugs in contravention of section 23 of the Misuse of Drugs Act 1971; this act enables a constable, if he has reasonable grounds

¹⁷ *Swankie v Milne*, 1973 J. C. 1.

¹⁸ *Wither v Reid*, 1980 J. C. 7.

to suspect that a person is in unlawful possession of a controlled drugs, to search that person and detain him for the purpose of that search.

The police officers, when exercising their power to detain the respondent and others, instead of telling them that they were detaining them on suspicion of being in possession of a controlled drug and that they would be searched, told them they being arrested...., this being the point on which the counsel for the respondent relied for his submission. They were then taken to the police station where the respondent violently resisted being searched and was charged with assaulting a police officer in the execution of her duty. The respondent was acquitted and the prosecutor appealed to the High Court.

At the High Court there were two conflicting opinions. First, Lord Justice Clerk Wheatley stated that:

I do not consider that the fact that Detective Sergeant Sounden used the wrong word vitiates the procedure which was otherwise unimpeachable. I accept that a penal statute must be construed in favour of the subject when a doubt arises, but I do not consider this error in terminology should vitiate a conviction.

Second, Lord Kissen and Lord Robertson. Lord Kissen stated that:

...Whatever may have been in the mind of the detective sergeant, he did tell the respondent that she was under arrest. He purported to arrest her. I cannot see how the later explanation to the respondent, apparently based on s. 23(2)(a), can alter what he specifically said he was doing. His apparent confusion about his powers cannot, in my opinion, mean that he was not putting her under 'arrest' as he himself clearly thought he was doing despite the explanation.

Lord Robertson stated that:

In my opinion, in deference to the rights of the citizen, it must be made perfectly clear to the person against whom action is being taken under s. 23(2)(a) that that is what is being done and that he is not being arrested....It will not do, in my opinion, to say that she was bound to know the law and so was bound to realise that, although the police officers used the word 'arrest', they really meant 'detain', and were proceeding under s. 23(2)(a).

In trying to establish criteria by which one can determine the elements that constitute arrest, one is not only confined to court decisions but can have

regard to the opinion of jurists. One opinion which I have read and I think worthy of mention is submitted by Wilson Finnie.¹⁹

We may consider four factors as being potentially relevant: a) the state of mind of the person putatively arrested, i.e. whether he considered himself as free to go or as obliged to stay; b) the state of mind of the constable, i.e. whether or not he considered that he had made an arrest; c) the word used by the constable to the person putatively arrested; d) the action of the constable and in particular what, if any, force was used by him. To the extent that the first two factors are relevant the test may be said to be subjective.....and to the extent that the second two factors are relevant the test may be said to be objective.

Section (2) Arrest and similar procedures

It is advisable, before discussing the main aspects of arrest, to outline procedures similar to it in order to point out the difference between these procedures and arrest. Although these procedures are given different names in the four legal systems investigated, they exist in all of them.

The procedures which could be considered similar to arrest and need to be clarified are stoppage and detention, namely detention under section 13 and section 14 of the Criminal Procedure (Scotland) Act 1995.

(1) Stoppage

Stoppage is a procedure which entitles a police officer, while investigating a crime, to stop an individual and ask him his name and address and where he is going. This procedure is lawful for a police officer when a person puts himself under suspicion, such as when a suspect at night is carrying something and suddenly runs away when he sees a policeman approaching him.²⁰

¹⁹ Wilson Finnie, *Arrest*, 1980 S. L. T. (News) 201.

²⁰ E.D.D.C.C. Cassation No., 30, 11 January 1979, p.54.

Egyptian Law

The 1950 Act contains no provisions to deal with stoppage. However, this subject is widely discussed by Egyptian jurists and judiciary. Therefore, we will review the decisions of Egyptian Cassation Court relating to stoppage and then we will refer to some of the opinions of Egyptian jurists. In addition, we will discuss the powers of a judicial police officer, those which are granted to him by the law in a particular situation and are identified as protective procedures.

Stoppage in the view of the judiciary

In some of its decisions the Egyptian Cassation Court defines 'stoppage' thus: 'stoppage is merely stopping a person who has put himself in a suspicious situation in order to identify him, on condition that it does not infringe his personal liberty'.²¹ In another case the Egyptian Cassation Court stated that 'stoppage is a procedure carried out by a person of public authority for the investigation of crimes, and is justified by particular circumstances'.²² Therefore, a person of public authority is entitled to stop an individual and investigate him and unveil the suspicious situation into which the individual has put himself; 'where stoppage is justified, the person of public authority has a right to take a stopped person to an investigating officer in order to investigate him'.²³

Analysis of these two decisions shows that, in the former, the Egyptian Cassation Court stated that stoppage is allowed to a police man but this should not go beyond asking a person his name and nor infringe his personal liberty. According to this, taking a suspected person to a police station is unlawful. The court emphasised this when it stated in a case submitted to it from the Appeal Court (which decided that the procedure which had been

²¹ Ibid, cassation No., 30, 11 January 1979, p.54.

²² Ibid, cassation No., 19, 18 March 1968.

²³ Ibid, cassation, No., 30, 25 January 1979, p.159.

carried out against the accused was a stoppage) that what two detectives did, when they stopped the accused and restricted him after he had got off the train and took him to a police station, was considered not stoppage but arrest, which was unlawful in that situation.²⁴ However, from the second decision it appears that the court expanded the meaning of stoppage and gave a public authority person the right to infringe the personal liberty of a suspected person by taking him to a police station. From the above decisions of the Egyptian Cassation court the following conclusions can be drawn:

- a) Stoppage means stopping a person in order to identify him or to explore a suspicious situation.
- b) The justifications for stoppage are:
 - That a person has put himself into a suspicious situation.
 - Particular circumstances could justify a stoppage.
- c) Content of stoppage: first the court stated that stoppage should not include physical contact with the person, otherwise it is considered as arrest; it then allowed that the policeman could stop and take the person to the police station. This indeed can be considered an expansion of the meaning of stoppage which is not justified by law.
- d) Persons entitled to carry out stoppage: all persons of public authority whether or not they are investigating officers.

Stoppage in the view of the jurists

Most Egyptian procedure jurists mention stoppage when they deal with arrest to distinguish between the two terms. They explain stoppage from several aspects as follows:

- 1- Nature of stoppage: One group of jurists regard stoppage as an investigative procedure which can be carried out by any policeman even if

²⁴ Ibid, cassation, No., 38, 20 January 1959, p. 740.

he is only administrative.²⁵ Another group regard it as a “protective method”²⁶ which is a function of the administrative police. A third group consider it as an arrest which is not supported by any legal provision.²⁷

- 2- Content of stoppage: Generally, there is unanimity among Egyptian jurists that stoppage should not be carried out with violence. Although they countenance taking suspects to the police station, some stipulated that this should not be executed by force.
- 3- Limitation of stoppage: Jurists are agreed that the scope of stoppage is wider than the scope of arrest, in that the former can be executed in all crimes, while the latter is restricted to particular crimes.
- 4- Executions of stoppage: Generally, most jurists state that stoppage does not lead to other procedures, unlike arrest which permits the arrested person to be searched.

Protective procedures

Apart from the situation in which a person is caught in *flagrante delicto*, where a judicial police officer is entitled to arrest an accused person without warrant (as we will see later), Article (35/2) of the Egyptian Criminal Procedures Law amended by the 1972/37 Act, grants a judicial police officer powers short of arrest by providing that where there is sufficient evidence to accuse a person of committing a felony or misdemeanour of theft, swindling, serious assault or violent resistance against the police, a judicial police officer has the right to carry out appropriate protective procedures and to immediately seek a warrant from the inquiry officer (prosecutor or inquiry judge) to arrest the offender. It is worth noting that Article (35/2) is an amendment of Article (34) which gives the judicial police officer power to

²⁵ Husni. M.N supra, n. 9 p. 564; Abdul Settar. F., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabia (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1986 p. 274.

²⁶ Awadh. M.M., *Al-Qabdh Wa Al-Habs Al-Ehteyati Fi Al-Qanun Al-Sudani* (Arabic) (Arrest and Protective Detention Under Sudanian Law) (comparative study) Law and Economy Journal No: 4, Cairo University, 1963, p. 518.

²⁷ Al-Marseffawi. H. S supra, n. 9 p. 60.

arrest where such offences are committed. The reason for the amendment was the issuing of the Egyptian constitution (1971) which provides in Article (41) that personal liberty is a natural right and is to be highly protected. Except in the cases of persons caught in *flagrante delicto* and the cases of warrants from a competent prosecutor or judge justified by the necessity of inquiry and the protection of society, it is impermissible to arrest, search, detain or restrict the liberty of any person by any restriction.

The questions which present themselves here are: what is the nature of the protective procedures which can be carried out by a judicial police officer and what is the difference between these procedures and arrest? The Egyptian Criminal Procedures Law has no definition of these protective procedures; however, the Explanatory Note of the 1972/37 Act tries to identify these procedures when it states that protective procedures are procedures differing from arrest in their legal nature. It considers as a protective procedure that action carried out by a judicial police officer until he receives a warrant from the prosecution to arrest the accused person. The Explanatory Note states that procedures constitute no infringement of an individual's liberty, and amount to the procedures which are carried out by the police in the case of *flagrante delicto*, where the police are entitled to prevent people from leaving the place of the event until their initial inquiries are terminated.²⁸

As it is general and imprecise, the interpretation provided by the Explanatory Note is obviously not sufficient to identify protective procedures. Moreover, the Note confuses the power of the police to take protective procedures with their power to prevent people in the case of *flagrante delicto* from leaving the place of the event.²⁹

Appropriate protective procedures mean procedures which prevent the accused from absconding or disposing of evidence. These procedures could

²⁸ Al-Mohennadi. H supra n. 6 p. 130.

²⁹ Husni. M. N., *Al-Qabdh Ala Al-Ashkhas* (Arabic) (Arrest of persons) Searches and Studies Centre of Fighting Crime and Criminal treatment, 1994, p. 29; Mahdi. A., *Sharh Al-Qawa'id Al-Ammah Lil Ijra'at Al-Jina'iyah Al-Juz' Awwal* Dar Al-nahda Al-arabiah (Arabic) (Explanation of the General Principles of the Criminal Prosedure part 1) (Cairo 1995) p.158.

involve stopping the accused, disarming him, or taking him to a police station.³⁰

Unlike arrest, which is an inquiry procedure under Egyptian Law, protective procedures are considered mere investigative procedures. Thus, the police are not entitled to follow these procedures to search the accused person in order to find any evidence. However, the police can search that person to prevent him from either harming himself or others.³¹

Although the law states no particular period for a person to be held under protective procedures, a person should not remain under these for longer than the time needed to inform a competent prosecutor or judge and get the response either to arrest or release him. In any case, the period should not exceed twenty-four hours, which is the time permitted to the police to hold a person under arrest.³²

Egyptian jurists disagree on the legal nature of protective procedures. Some jurists consider protective procedures as precautionary procedures which should be granted to the police in a case where a police officer has sufficient evidence to accuse a person before him of committing an offence, but cannot make an arrest until he receives a warrant from a prosecutor or a judge. This group of jurists do not consider these procedures as arrest and therefore the consequences following arrest are inapplicable. Thus, a person subjects to protective procedures is not subject to being searched in order to find incriminating evidence against him, as if he were under arrest.³³

³⁰ Husni. M. N supra n. 29 p. 29.

³¹ Mahdi. A supra, n. 29 p. 159.

³² Husni. M. N supra, n. 29 p. 29; Mahdi. A supra, n. 29 p. 159; Srour. A. F., *Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabia (Arabic) (Criminal Procedures) 1993, p. 349.

³³ Awadh Mohammad, *Al-Ijra`at Al-Jina`iyyah Al-Juz` Al-Awwal* (Arabic) (Criminal Procedures part.1) 1990, p.356; Al-Halabi. M. A., *Dhamanat Al-Hurreiah Al-Shakhseyah Athnaa` Al-Tahery Wal Istedlal* (Arabic) Personal Liberty Safeguards in Investigation 'in comparative law' 1981 University of Kuwait, p.102; this view could be supported by a decision of the Egyptian Cassation Court when it stated, on the occasion of dealing with Article 41 of the Egyptian Constitution, that any restriction upon personal liberty as a natural right, whatever that restriction is, whether arrest, search, prevention from moving or any restrictions less than that, cannot be executed except in the case of *flagrante delicto* or by a warrant from a competent authority. (Cassation No. 186, Nov 1983, p.934).

The second group of Egyptian jurists see no difference between protective procedures and arrest since both deprive an individual of his freedom, even if the period of deprivation under the protective procedures is shorter than the one under arrest. They consider such procedures as a kind of arrest which is unjustified by the law, and lacking the safeguards established in favour of a person under legal arrest.³⁴

Reviewing the above discussion, I find myself agreeing with the second view. It is obvious that where a person is detained in order to enable the police to carry out further procedures against him he is without any doubt under arrest, irrespective of the terms used to describe that situation. The gravity of these procedures does not only arise from the putting of an accused person in the same situation as if he were under arrest, but also arises from the non-application of safeguards established for a person under legal arrest. It is apparent that Article (35/2) is trying in granting such powers to the police, to avoid the restriction of provision (41) of the constitution which prohibits arrest without warrant unless the offence is in progress. In spite of this, in my view a judicial police officer can carry out the protective procedures for the above offences if the accused person fails to give his name or address, or the judicial police officer has reasonable grounds to believe that the name or address given is false.

The UAE Law

Prior to the federal Criminal Procedure Act 1992, the Criminal Procedure (Dubai) Act 1971 stated that “a policeman is permitted to ask any person, suspected by him on reasonable grounds of having committed any kind of crime, his name and address and may take him to the police station”.³⁵

³⁴ Al-Marseffawi. H. S supra, n. 10 p. 62.

³⁵ Dubai Criminal Procedure, Act 1971, Art. 5.

Therefore, where no crime has been committed, or there are no reasonable grounds to suspect a person of committing a crime, stoppage is unlawful.

The UAE Penal Procedure Act 1992 did not include stoppage in its provisions; it follows the Egyptian direction in this matter. In spite of this, stoppage could generally be carried out by a police officer under his duties to investigate crimes. The 1992 Act, where it deals with policemen's duties states: "Judicial police officers should detect crimes, search for offenders, and collect information and evidence required for inquiry and conviction."³⁶ Thus policemen are entitled to exercise stoppage when they are carrying out their duties in order to investigate crimes. In addition to this a policeman, under his general function to keep society secure and safe, needs to be given the right to stop an individual, on condition that this does not exceed asking the individual to give his name and address or attend a police station. In other words, stoppage must not lead to deprivation of individual liberty, unless other grounds appear which change it to arrest.

English Law

The Police and Criminal Evidence Act 1984 gives the police a general power to stop and search persons or vehicles for stolen goods or other unlawful articles;³⁷ some areas of the country, prior to the 1984 Act, offered such a power in relation to stolen goods (London under s66 of the Metropolitan Police Act 1839). And there were, and still are, several statutory powers of stop and search stated: for example, the Firearms Act 1968, section 47; the Misuse of Drugs Act 1971, section 23; the Aviation Security Act 1982, section 27(1); the Sporting Events(Control of Alcohol) Act 1985, section 7; the Crossbows Act 1987, section 4, and others.³⁸ The 1984 Act in part 1

³⁶ The UAE Penal Procedure, Act 1992, Art. 30.

³⁷ The police and Criminal Evidence Act 1984 section 1 (3).

³⁸ See the Code of Practice A- Annex A. The Police and Criminal Evidence Act 1984 is accompanied by five Codes of Practice: Code A on Stop and Search; Code B on Search of

did not bring about fundamental change but basically legalized existing police practice.³⁹

Reasonable grounds for stoppage

Section 1 (3) of PACE states that the constable must have “reasonable grounds for suspecting that he will find stolen or prohibited articles.” To decide whether or not the constable has reasonable grounds will depend upon the facts of each individual case. So in order to reach this decision, cases should be examined separately.

The Code of Practice (1985) states that “whether reasonable ground for suspicion exists will depend on circumstances in each case, but there must be some objective basis for it. An officer will need to consider the nature of the article suspected of being carried in the context of other factors such as the time and the place, and the behaviour of the person concerned or those with him. Reasonable suspicion may exist, for example, where information has been received such as a description of an article being carried or of a suspected offender; a person is seen acting covertly or warily or attempting to hide something; or a person is carrying a certain type of article at an unusual time or in a place where a number of burglaries or thefts are known to have recently taken place. But the decision to stop and search must be based on all the facts which bear on the likelihood that an article of a certain kind will be found.”⁴⁰ In addition it states “Reasonable suspicion can never be supported on the basis of personal factors alone. For example, a person’s colour, age, hairstyle or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with each other as the sole basis on which to search that person.

Premises; Code C on Detention, Questioning and Treatment of Persons in Custody; Code D on Identification; and Code E on Tape-recording of Interviews. The new version of the codes came into force on 8 April 1995.

³⁹ Bevan and Lidstone *supra*, n. 4 p. 41.

⁴⁰ Code of Practice A- the exercise by police officers of statutory powers of stop and search, para 1-6.

Nor may it be founded on the basis of stereotyped images of certain persons or groups as more likely to be committing offences.”⁴¹

The 1984 Act defines a prohibited article as either an offensive weapon which means any article made or adapted for use to cause injury to persons, or intended by the person having it with him for such use by him or by some other person, or an article made or adapted for use in the course of or in connection with an offence of burglary, theft, taking a motor vehicle or other conveyance without authority, or for obtaining property by deception.⁴² A constable has no power to stop a person in order to find grounds for suspicion.⁴³ In addition a constable has no power to stop a person unless he attempts to search him.⁴⁴

In *Collins v. Wilcock*⁴⁵ it was stated that:

.....it is a commonplace of ordinary life that one person may request another to stop and speak to him; if the latter complies with the request, he may be said to do so willingly, and in either event the first person may be said to be ‘stopping and detaining’ the latter. There is nothing unlawful in such an act. If a police officer ‘stop and detain’ another person, he in our opinion commits no unlawful act, despite the fact that his uniform may give his request a certain authority and so render it more likely to be complied with. But if a police officer, not exercising his power of arrest, nevertheless reinforces his request with the actual use of force, or the threat (actual or implicit) to use force if the other person does not comply, then his act in thereby detaining the other person will be unlawful.

Nevertheless, the police frequently stop people relying on their consent, irrespective of whether that consent is real or a result of their ignorance about their rights and the scope of police power in respect to stoppage. Research carried out by David Dixon, Clive Coleman and Keith Bottomley ‘*Consent and legal Regulation of Policing*’ shows to what extent people are unaware of their rights and how the police take advantage of this:

⁴¹ Ibid, para, 1-7.

⁴² The Police and Criminal Evidence Act 1984, section 1 (7) (8) (9).

⁴³ Bevan and Lidstone *supra* n. 4 p. 45.

⁴⁴ Ibid, p. 51-52.

⁴⁵ *Collins v Wilcock* [1984] 3 All ER, p. 374.

... We asked officers how often people whom they stopped and searched knew their rights; seventy-nine per cent said rarely or never. Such lack of knowledge must mean that their 'consent' has little substance. Familiar strategies are used to deal with those who do raise questions about the authority to search. As a sergeant put it: 'A lot of people are not quite certain that they have a right to say no. And then we, sort of, bamboozle them into allowing us to search.' Such 'bamboozling' is done by appealing to the willingness of the innocent to be searched, by threatening arrest, or by claiming the authority of fictional powers.

This is certainly the way in which some people are handled; however, it is too legalistic as an account of how many interact with the police. The reality for them may not be acquiescence based on ignorance, but submission rooted in an appreciation of the contextual irrelevance of rights and legal provisions. 'Rights' are seen by officers as properly belonging to some people, but not to the young and unrespectable whom they usually encounter in the street.⁴⁶

Misuse of Power

When he exercises the power of stop and search, a constable must consider the scope of this power, otherwise he will expose himself to undesirable consequences perhaps to a civil action. Moreover, the Code of Practice states "Misuse of the power is likely to be harmful to the police effort in the long-term. This can lead to mistrust of the police by the community".⁴⁷ A constable who is acting unlawfully may be resisted by the use of force by the citizen. The Criminal Law Act 1967, permits a citizen to use reasonable force against a constable, or anyone else who is acting unlawfully against him.⁴⁸

⁴⁶ David Dixon, Clive Coleman, and Keth Bottomley, *Consent and Legal Regulation of Policing*, Journal of Law and Society, Volume 17, 1990, p. 345.

⁴⁷ Code of Practice A, Notes for Guidance 1A.

⁴⁸ Criminal Law Act 1967.s 3.

Scottish Law

The Criminal Procedure (Scotland) Act 1995, does not provide stoppage power directly, but this power arises, expressly or implicitly, whenever the constable proposes to conduct a detention under section 13 of the 1995 Act. This Act accords a constable limited power to detain a person suspected by him on reasonable grounds of having committed or of committing an offence at any place, in order to enable the constable to ask the suspect his name and address and to obtain an explanation of the suspicious circumstances. According to section 13 of Act 1995 the power to stop a suspect often accompanies the power to detain him.

Scope of stoppage:

It can be stated that the power to stop is an essential step for carrying out a detention, therefore the same requirement of reasonable ground which is provided by the 1995 Act to detain a suspect for the purposes of investigation applies.

Consequences of stoppage:

The consequences of stoppage may depend on the conduct of the suspect:⁴⁹

- 1- He may give particulars and a satisfactory explanation to the constable who then lets the suspect go on his way.
- 2- He may refuse to remain with the constable or refuse to give his name and address or give a false name and address which may lead to arrest.
- 3- His explanation, or failure to give an explanation, may give rise to reasonable ground to suspect him of an offence punishable with imprisonment, which empowers the constable to detain him under section 14 of the Act.

⁴⁹ Renton and Brown *Criminal Procedure according to the law of Scotland* (6 th edn, 1996), para 6-08.

- 4- Sufficient grounds may be provided by the surrounding circumstances which entitle the constable to arrest him.

(2) Detention under the Criminal Procedure (Scotland) Act 1995

Detention is a statutory police power short of arrest in Scottish criminal procedure law. Both detention and arrest are criminal procedures which clearly involve serious impositions upon the rights of individuals. Because of this, it is highly desirable to indicate that detention is a preliminary step which sometimes but not always leads to the arrest of a suspect, and it is important to differentiate between detention and arrest.

Prior to the Criminal Justice (Scotland) Act 1980 coming into force the only method whereby police could take a suspect into custody was to arrest him. The introduction of the police power of detention of suspects in June 1981, under the terms of sections 1 and 2 of the 1980 Act (which are now sections 13 and 14 of the 1995 Act), granted the police the right to detain a suspect person in certain specific circumstances. These circumstances will be discussed by considering sections 13 and 14 of the 1995 Act below.

Detention under section 13 of the 1995 Act

Section 13 confers on a constable limited power to detain a person suspected by him on reasonable grounds of having committed or of committing an offence at any place, and to require him to give his name and address and an explanation of the circumstances giving rise to the suspicion.

The right of the constable to detain a suspect is limited by the requirement of the existence of suspicion on reasonable grounds that a person has committed or is committing an offence. It is very difficult to determine exactly what the Act means by reasonable ground and whether it imposes an objective or subjective standard. In theory it might be supposed to be an objective standard, but where "suspicion" exists only in the constable's mind

it can properly be described as a subjective standard.⁵⁰ Lord Devlin when considering the phrase in *Hussien v. Chong Fook Kam*⁵¹ observed that:

suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.

He observed that it would be perfectly legitimate in forming a "reasonable suspicion" to rely on things which would be inadmissible in evidence, such as knowledge of a suspect's previous convictions.

The Thomson committee report stated that the:

present unwritten code which is familiar to every police officer, but much less familiar to the public might roughly be said to include: (1) the demeanour of the suspect; (2) the gait and manner of the suspect; (3) any knowledge the officer may have of the suspect's character or background; (4) whether the suspect is carrying anything, and the nature of what he is carrying; (5) the mode of his dress, bulges in his clothing, and particularly when these factors are considered in the light of all the surrounding circumstances; (6) the time of observation; (7) any remarks or conversation which he makes to any other person which might be overheard by an officer; (8) the street or the area involved; (9) information from the third party, who may in given circumstances be known or unknown; (10) any connection between that person and other person whose conduct at that time is reasonably suspect; (11) the suspect's apparent connection with any overt criminal activity. mere physical appearance or dress, or presence or residence in a particular area, should not be sufficient to justify detention.⁵²

The power of detention under section 13 is not restricted to offences punishable by imprisonment as under section 14. Accordingly, all offences from breach of the peace to murder are included.⁵³ By referring to an offence that a person has committed or is committing, the Act in this matter follows the general principle in Scottish criminal law that there is no prescriptive

⁵⁰ Wilson Finnie, *Police Power Falling short of Arrest*, 1981 S.L.T (News) 173 at 177.

⁵¹ *Hussien v. Chong Fook Kam* [1970] A.C. 492. p. 198.

⁵² Thomson Committee Report, Cmnd. 6218. para 3.19.

⁵³ Wilson Finnie *supra* n. 50 at 174.

period for all or most offences. Thus the power to detain is not restricted to offences committed in the recent past.⁵⁴

The constable may exercise the power to detain, either at the place of the suspected offence if he found the suspect there or at any place in Scotland⁵⁵ where the constable is entitled to be. This would include: (a) any public place (b) any police station (c) any private place into which the constable had been invited (d) places to which he had been permitted access by statute (e) any place where his presence is justified by urgency.⁵⁶

Section 13 not only empowers the constable to detain a person suspected on reasonable grounds of committing or having committed an offence, but also empowers him to detain potential witnesses. However, the constable must believe that the witness has information relating to the suspected offence.⁵⁷ The constable may require the witness to give his name and address and he must inform him: (a) of his suspicion that the offence has been committed and of its general nature, (b) that he believes the witness has relevant information,⁵⁸ (c) that failure to comply may constitute an offence.⁵⁹

After this stage it seems that one of three results may follow:

- 1- the witness may comply with the requirements of the constable; the statute is then exhausted.
- 2- the witness may refuse to comply “without reasonable excuse” and may be guilty of an offence⁶⁰ and become subject to arrest without warrant.⁶¹
- 3- the constable has reasonable grounds for suspecting that the name and address are false; he may then arrest the witness under s.13 (6)(b).

⁵⁴ Ibid.

⁵⁵ Renton and Brown *supra*, n. 49 para 6-06.

⁵⁶ Ibid.

⁵⁷ The 1995 Act s. 13 (1)(b).

⁵⁸ Ibid, s. 13 (5)(b).

⁵⁹ Ibid, s. 13 (5)(d).

⁶⁰ Ibid, s. 13 (6)(b).

⁶¹ Ibid, s. 13 (7).

In regard to a suspect, section 13 empowers the constable to detain a suspect for the purpose of requiring the suspect to give his name and address, and asking him for an explanation of the suspicious circumstances,⁶² and the constable may require the suspect to remain with him for verification of the name and address and noting the explanation.⁶³ Where the detention is for verification purposes, the Act specifies that this can only be done where it appears to the constable that such verification can be obtained quickly.⁶⁴

The power to detain to note an explanation lasts only as long as it takes to note the explanation given. The constable is given specific power to use reasonable force to ensure that the suspect does remain with him.⁶⁵ Before exercising any of these powers, the constable must inform the suspect of his suspicion and the general nature of the suspected offence⁶⁶ and why the suspect is being required to remain with him.⁶⁷

Section 13 (6)(a)(i) makes only the failure without reasonable excuse to give one's name and address an offence. Accordingly, failure to give an explanation of the circumstances to the constable does not constitute an offence. However, failure to remain with the constable, when the suspect was asked to do so, may be an offence according to section 13 (6)(a)(ii). Both the offences which are created by s.13 (6)(a)(i) and s.13 (6)(a)(ii) imply power to arrest without warrant anyone suspected on reasonable grounds of having committed them.⁶⁸

After the suspect has been stopped under section 13, one of the following outcomes will accrue:⁶⁹

⁶² Ibid, s. 13 (1)(a).

⁶³ Ibid, s. 13 (2).

⁶⁴ Ibid, s. 13 (3).

⁶⁵ Ibid, s. 13 (4).

⁶⁶ Ibid, s. 13 (5)(a).

⁶⁷ Ibid, s. 13 (5)(c).

⁶⁸ Ibid s. 13 (7).

⁶⁹ Renton and Brown *supra*, n. 49 para 6-08.

1. The suspect may manage to give a satisfactory explanation to the constable, who then lets him go on his way.
2. He may refuse to give his name or address or he may give a false name or address, which may lead the constable to arrest him.
3. He may refuse to remain with the constable, which may also lead the constable to arrest him.
4. His explanation, or his failure to give an explanation, may lead to the constable having reasonable grounds to suspect him of an offence punishable with imprisonment, and he may then detain the suspect under s.14 of the Act.
5. Sufficient grounds for his arrest for an offence may be provided by the surrounding circumstances, in which case the constable may arrest him.

Detention under section 14 of the 1995 Act

Section 14 of the 1995 Act provides that a constable may detain a person who, he has reasonable grounds for suspecting, has committed or is committing an offence punishable by imprisonment.

Before exercising the right to detain, the constable must be sure of the existence of two important factors:

- (1) that he has reasonable grounds for suspicion;
- (2) that the offence involved is punishable by imprisonment. All common law offences are punishable by imprisonment, but many statutory offences are not.

The purpose of empowering the constable to detain a person is to enable him to carry out investigation into the offence and to determine whether or not criminal proceedings should be instigated against that person.⁷⁰

The period of detention may not last more than six hours, counting from the time detention begins. For example, if the detention begins on the street and it takes two hours to reach a police station, the detention must be ended

⁷⁰ The 1995 Act s. 14 (1)(a)(b).

four hours after reaching the police station, and any further actual detention will be unlawful.⁷¹ Besides the expiry of the period, detention may be terminated when there are no longer grounds to detain the suspect for the purpose of investigation,⁷² or when the detainee is arrested⁷³ or detained in pursuance of any other statutory provision.⁷⁴

When carrying out the detention, the constable must follow specific procedures to ensure that he is acting lawfully: (1) he must inform the suspect of his suspicion and the general nature of the offence he suspects has been or is being committed and the reason for the detention.⁷⁵ (2) The constable must inform the suspect that he is under no obligation to answer questions except to give his name and address.⁷⁶ (3) The constable must take the suspect as quickly as is reasonably practicable to a police station or other premises.⁷⁷ “As quickly as is reasonably practicable” seems to mean without unnecessary delay. Factors which justify a delay in taking a detainee to the police station or other premises could be distance or unavailability of transport and the like.⁷⁸

The function of detention

As we mentioned above, detention under section 14 is for the purpose of facilitating the carrying out of investigations (a) into the suspected offence, and (b) as to whether criminal proceedings should be instigated against the detainee. In addition, the effect of detention is to isolate the suspect in order to prevent him from interfering with evidence or witnesses and to enable the constable to exercise the following powers in relation to him:

⁷¹ Ibid, s. 14 (2).

⁷² Ibid, s. 14 (2)(c).

⁷³ Ibid, s. 14 (2)(a).

⁷⁴ Ibid, s. 14 (2)(b).

⁷⁵ Ibid, s. 14 (6).

⁷⁶ Ibid, s. 14 (9).

⁷⁷ Ibid, s. 14 (1).

⁷⁸ Wilson Finnie *supra*, n. 50 at 175.

- 1- to put questions in relation to the suspected offence. However, this does not affect the normal rules on admissibility of evidence with regard to the questioning of a suspect.⁷⁹ The suspect should be cautioned before being questioned that anything he says may be taken down and used in evidence, informing him that he is not obliged to say anything except to give his name and address.⁸⁰
- 2- to exercise the same powers of search as are available following an arrest.⁸¹
- 3- to take fingerprints, palmprints and such other prints and impressions as the constable may, having regard to the circumstances of the suspected offence, reasonably consider appropriate.⁸²

The rights of the detainee

Section 14, when empowering the constable to detain a suspect, correspondingly gives the detainee specific rights to protect him against any possibility of excessive exercise of power by the police.

- He has a right to be informed by the detaining constable of his suspicion as to the general nature of the offence suspected and of the reason for the detention.⁸³
- He has a right to be told at the time of his detention, and on arrival at the police station, that he is under no obligation to answer any question other than to give his name and address.⁸⁴
- A record must be kept of the time when he was told of his right (above) and of the identity of the constable who told him.⁸⁵

⁷⁹ The 1995 Act s. 14 (7)(a).

⁸⁰ Ibid, s. 14 (9).

⁸¹ Ibid, s. 14 (7)(b).

⁸² The 1995 Act s. 18 (2).

⁸³ Ibid, s. 14 (6).

⁸⁴ Ibid, s. 14 (9).

⁸⁵ Ibid, s. 14 (6)(e).

- He must be informed of his right to contact the outside world. He has the right to have a solicitor and one other person reasonably named by him informed of the fact that he is being detained and the place of detention.⁸⁶ The phrase “reasonably named” seems to be aimed at two things. First, to avoid having to inform the suspect’s accomplices about the detention. Second, as this right is granted to the detainee to prevent other persons from worrying about his non-return, it should be restricted to one of his family or close friends.⁸⁷ The intimation must be sent without any more delay than is necessary in the interest of the investigation such as the prevention of crime or the apprehension of offenders.⁸⁸ The situation is different if the detainee is under 16 years of age. In this case the constable must immediately send to the detainee’s parent or guardian notice of the fact and whereabouts of detention.⁸⁹
- A record must be kept which includes the following:
 1. The time when he was informed of his right of intimation and of the identity of the constable who informed him. If he requested an intimation, the time when it was made together with the time when the request was complied with.⁹⁰
 2. The place where detention began and the police station to which the detainee was taken.⁹¹ The general nature of the suspected offence.⁹² The time when detention began and the time of arrival at the police station.⁹³
 3. The time of the person’s release from the police station or the time of his arrest in respect of the alleged offence.⁹⁴

⁸⁶ Ibid, s. 15 (1).

⁸⁷ Wilson Finnie *supra*, n.50 at 176.

⁸⁸ The 1995 Act s. 15 (1)(b).

⁸⁹ Ibid, s. 15 (4).

⁹⁰ Ibid, s. 14 (6)(e).

⁹¹ Ibid, s. 14 (6)(a).

⁹² Ibid, s. 14 (6)(c).

⁹³ Ibid, s. 14 (6)(d).

⁹⁴ Ibid, s. 14 (6)(g).

- He has the right to have destroyed by the police any record of any prints or impressions or any sample and any information derived therefrom taken from him, as soon as possible after any decision is taken not to prosecute him, or on conclusion of the prosecution otherwise than by a conviction or by an absolute discharge in summary procedure.⁹⁵

Re-detention

Section 14 (3) limits the power to re-detain suspects after the initial period of detention has ended. It provides that “where a person has been released at the termination of a period of detention under subsection (1) above he shall not thereafter be detained, under that subsection, on the same grounds or on any grounds arising out of the same circumstances”.

The literal interpretation of the wording of the subsection would fail to protect a person whose detention was terminated but who was not released.⁹⁶ Whether or not section 14 (3) does indeed extend to a person who is entitled to be released should be a matter for the courts. Moreover, it could be said that the subsection again does not cover the case where the suspected person was released, not at the termination of the period of detention, but before that when there ceased to be reasonable grounds for suspecting the detainee of an impressionable offence.

Bates in his article⁹⁷ mentions some examples of the grounds which might or might not prohibit re-detention according to the subsection. It seems to me worth mentioning these. He states that:

suppose constable A sees a suspect (S) running from a house carrying a gold chain. As S enters a car, A detains him on suspicion of theft of the chain. Section 2(3) would prohibit redetention on suspicion of the same offence or on suspicion of theft of the car. Section 2(3) also prohibits redetention where suspicion arises out of the same circumstances relating to the commission of a prior offence. Suppose constable A sees S running from a house carrying a gold chain and recognizes him as fitting the

⁹⁵ Ibid, s. 18 (3).

⁹⁶ T. St. J. N. Bates *Detention* 1982 S.L.T (News) 267.

⁹⁷ Ibid.

description of a person involved in a theft six months previously. If he detain S on suspicion of theft of the chain s.2(3) prohibits redetention on suspicion of that offence or the prior offence....more difficult is the case where the offence occurs within the same circumstances but the suspicion arises later. Suppose constable A simply sees S carrying a gold chain and entering a car. A detains S on suspicion of theft of chain but he is subsequently released. X later claims to have witnessed S climbing into the house half an hour before the detention. Here it is not clear whether S may be redetained on this new ground of suspicion. It could be argued that s.2(3) does not prohibit redetention because the new ground of suspicion did not arise out of the same circumstances.

Distinction between detention and arrest

Where a person is detained or is under arrest, he is in legal custody. However, it seems to be possible to make a distinction between detention and arrest. In theory, where the constable has reasonable grounds for believing that he is entitled to charge the accused he should arrest him. Then he is not supposed to be questioned. Where the constable suspects that that the suspect has committed an offence but has not as yet obtained sufficient evidence to charge him, he should merely detain him in order to obtain a *prima facie* case. Whether or not the police have the right to arrest a suspect person without having sufficient evidence to charge him and the right to question him after he has been arrested is a controversial matter.⁹⁸ The period of arrest is unlimited,⁹⁹ while the period of detention is limited to six hours. Detention is a statutory power, whereas the power of arrest is exercised under both common law and statute. Detention, unlike arrest, may not entitle the constable to put the suspected person on an identification parade.¹⁰⁰

⁹⁸ See e.g. Albert V Sheehan, *Criminal procedure 'Scottish Criminal Law and Practice Series'* (Butterworths 1990) para 3.03 1990 ; J Watson 'Police Power: Detention or Arrest, a legal complication' (1988) 33 J.L.S.S. 29. See also *Miln v Cullen* 1967 S.L.T 35 ; *Thomson v.HM Advocate* 1968 S.L.T 339 ; *Johnston v.HM Advocate* 1993 S.C.C.R. 693. See also J Watson's Article on *Johnston v HM Advocate* above, in *Scottish Law Gazette* 1996 vol. 64, No. 1 p. 6.

⁹⁹ Except the necessity of consecutive authorisations by the judiciary and the end-stop of the 110-day rule.

¹⁰⁰ Albert V Sheehan *supra*, n. 98 para 3.11 ; Renton and Brown *supra*, n. 49 para 6-14.

Scope Of Arrest

Scope Of Arrest

3

This chapter deals with two types of arrest, arrest under warrant and arrest without warrant. It also presents the situation in which a person could be arrested, persons who are authorised to order arrest, and persons who are entitled to effect it.

Section (1) Arrest under Warrant

This section deals with arrest under warrant and includes discussion of the authority which is entitled to grant a warrant for arrest, the grounds which justify such a warrant, and the execution of the warrant. These points will be discussed throughout with reference to the laws of Egypt, the UAE , England and Scotland.

Egyptian Law

The Egyptian Criminal Procedure Act 1950 authorizes the inquiry officer (the prosecutor or inquiry judge) to grant a warrant for the arrest of a defendant either on his own initiative or upon a request from the investigation officer. A warrant to arrest a person should contain his particulars (name and address etc.) and the alleged offence, and it should be dated and signed by the person who issued it.¹

¹ The Egyptian Criminal Procedure Act. 1950. Art. 127 (1).

In order to secure the attendance of the accused for interrogation, the inquiry officer may issue a warrant to arrest him.² The 1950 Act limits the issue of this type of warrant to felonies or misdemeanours punishable by more than three months in prison. Accordingly, misdemeanours and contraventions punishable by three months or less are not subject to such a warrant. In spite of this, the inquiry officer can issue such a warrant without observing the above limitation in the following cases:³

1. Where an accused has ignored a summons sent to him to attend interrogation.
2. Where he is likely to abscond.
3. Where his address is unknown.
4. Where the offence is in the process of being committed.

The inquiry officer may issue a warrant of arrest upon a request from an investigation officer. The 1950 Act provides that “where there is sufficient evidence to accuse a person of committing a felony or misdemeanour of theft, swindling, a serious assault or a violent resistance against the police the investigation officer has the right to carry out appropriate protective procedures and to seek immediately a warrant from the inquiry officer to arrest the offender.”⁴

In view of the nature of arrest which interferes with an individual's liberty, the 1950 Act limits a warrant's validity to six months unless it is renewed by the inquiry officer.⁵

An arrest warrant issued by any inquiry officer is enforceable throughout Egypt:⁶ a person arrested under such a warrant furth of the jurisdiction of the prosecution authority which issued the warrant should be sent to the prosecution authority in the jurisdiction in which he is arrested. It should

² Ibid, Art. 130.

³ Ibid.

⁴ Ibid, Art. 35 (2).

⁵ Ibid, Art. 139 (2).

⁶ Ibid. Art. 129.

verify his particulars and he must be informed of the charge and his statement taken, ⁷after which he must be transferred to the competent prosecution authority. In cases where the arrested person refuses to be transferred or transfer is impracticable, for example, because his health condition does not allow such a transfer,⁸ the inquiry officer should be notified and adopt the necessary procedures.

The arresting officer may enter premises in order to execute an arrest warrant and, if necessary, he can use reasonable force.⁹ The officer executing an arrest warrant is not obliged to be in possession of it. Moreover, the inquiry officer may in cases of urgency issue a warrant to arrest someone by telephone.¹⁰

The UAE Law

Under the UAE Penal Procedure Act 1992 any prosecutor can issue a warrant to arrest an accused person for the purpose of interrogation.¹¹ In this matter the 1992 Act adopts the stance of Egyptian Law as it limits the issue of a warrant to felony and misdemeanour or to cases where: (a) the accused did not submit to a summons sent to him to attend for interrogation (b) he is likely to abscond (c) his address is unknown (d) the offence is in the process of being committed.¹²

⁷ Ibid, Art. 132.

⁸ Ibid, Art. 133.

⁹ The arresting officer is entitled to enter the premises of an accused or other premises to execute an arrest warrant where he is sure that the accused is on the premises, and he should notify the occupier of the warrant. See: Abdul Settari, F., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabia (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1986 p. 28.

¹⁰ See: Husni. M.N., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabia (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1988 p. 565.

¹¹ The UAE Penal Procedure Act 1992. Art. 101.

¹² Ibid, Art. 102, 106.

It is worth noting that the 1992 Act, unlike the Egyptian 1950 Act,¹³ restricts the issue of a warrant to the prosecutor's volition only. A warrant of arrest may be executed without actual detention where the accused person is not likely to abscond and his address is known to the police.¹⁴

Regarding the form of a warrant and its validity, the Egyptian law and the UAE law are to a considerable extent identical. A warrant of arrest should contain the particulars of the accused and it should be dated and signed by the prosecutor who has issued it.¹⁵ It should be executed within six months of its issue.¹⁶ The arresting officer can execute a warrant of arrest throughout the UAE¹⁷ and during the execution of the arrest warrant he is not obliged to part company with it. In urgent situations, the prosecutor could grant a warrant of arrest by telephone.

A person arrested under a warrant furth of the jurisdiction of the prosecution authority which issued that warrant, should be brought before the prosecution authority in the jurisdiction in which he is arrested. After examining his particulars he should then be transferred to the competent prosecution authority. Where the arrested person refuses to be transferred or his health condition would not stand such a transfer, the competent prosecutor should adopt appropriate procedures as to whether he should be transferred or released.¹⁸

Although the provisions of the 1992 Act do not expressly confer any right upon the officer to enter premises to execute a warrant of arrest, in practice the arresting officer is entitled to do so where the accused is on such premises. The officer should not exceed the purpose of the warrant; for

¹³ The Egyptian Law gives the inquiry officer the right to issue a warrant to arrest whether on his own initiative or upon a request from the investigation officer.

¹⁴ See: Hafez Upu Saleem, *lectures on Summons and Arrest under warrant*, Dubai Public Prosecution (Judicial Institution) p. 8.

¹⁵ The 1992 Act. Art. 101.

¹⁶ Ibid, Art. 103.

¹⁷ Ibid.

¹⁸ Ibid, Art. 105.

example he has no right to search the premises unless he has a warrant to do so.

English Law

Prior to the coming into force of the 1984 Act the matter was regulated by the Magistrates' Court Act 1980, where section 1 (1) provides that "upon an information being laid before a justice of peace...that any person has, or is suspected of having, committed an offence the justices may...

- a) issue a summons directed to that person requiring him to appear before a magistrates' court for the area to answer the information, or
- b) issue a warrant to arrest that person and bring him before a magistrates' court for the area..."

Under the MCA 1980¹⁹ the issue of an arrest warrant was restricted to persons aged 17 and over and to offences punishable by imprisonment or where the defendant's address was not sufficiently established for a summons to be served on him. In addition, the Criminal Justice Act 1967 under section 24 (1) provides that a warrant for an arrest should not be issued unless the offence in question is indictable or punishable by imprisonment. Thus it clearly appears that a warrant to arrest an offender was rarely sought by the police even before the enactment of the 1984 Act.

In spite of the rarity of using a warrant to arrest, especially after the coming into force of the 1984 Act, which gives the police a power of summary arrest for arrestable offences²⁰ and for all other offences when the service of a summons is impractical or inappropriate,²¹ a warrant under section 1 MCA 1980 is in practice still sought. The first and the main reason for this is the protection of the constable from a civil action which could arise

¹⁹ Magistrates' Court Act 1980, s.1 (4).

²⁰ The Police and Criminal Evidence Act 1984, s.24.

²¹ Ibid, s.25, s.26 (2) and Sch2.

as a result of an unlawful arrest. The second reason is that arrest can take place under a warrant when the information alleges that a person “has or is suspected of having committed an offence” which means issue of a warrant could be permitted on mere suspicion in contrast with arrest without warrant which requires not only a suspicion but reasonable grounds for such suspicion.²²

A warrant of arrest issued by a justice of the peace remains in force until it is executed or withdrawn and may be executed anywhere in England and Wales by any person to whom it is directed or by any constable acting within his police area.²³ Section 33 of the 1984 Act (amending s 125(3) of the Magistrates’ Court Act 1980) provides “A warrant to which this subsection applies may be executed by a constable notwithstanding that it is not in his possession at the time; but the warrant shall, on the demand of the person arrested, be shown to him as soon as practicable”.

A constable may enter and search premises in order to execute a warrant to arrest²⁴ and, if necessary, he can use reasonable force.²⁵ Moreover, the constable has the right to enter premises to execute a warrant to arrest even if he is not sure that the said person is in premises concerned as long as he has reasonable grounds for believing that he is there.²⁶

Scottish Law

Generally, any judge, sheriff or justice of the peace may issue a warrant of arrest, but in practice the procurator fiscal usually makes an application to the

²² Bevan and Lidstone, *The Investigation of Crime; A guide to Police Powers* (2nd edn Butterworths 1996) p. 313.

²³ Magistrates Court Act 1980, s.125.

²⁴ the police and Criminal Evidence Act 1984 s.17 (1) (9).

²⁵ Ibid, s.117.

²⁶ Ibid, s.17 (2) (9).

sheriff to seek such a warrant.²⁷ When considering an application for an arrest warrant the sheriff should weigh in the balance private rights and the grounds upon which the warrant is sought. Such grounds should be legal grounds and the warrant the only way by which a suspect, an accused or even a witness can be made to attend a police station or be brought before a court.²⁸

Warrant to arrest a suspect

Common law in Scotland does not permit a warrant to arrest a suspect. Consequently, a suspect is not obliged to attend a police station to assist in police inquiries unless he is detained under section 14 of the Criminal Procedure (Scotland) Act 1995 or other statutory powers or has willingly consented to do so.²⁹

Warrant to arrest an accused

In order to take proceedings against an accused, a warrant may be issued by a court, at the request of the prosecutor, to arrest him in either solemn or summary procedure. In solemn procedure this is done by way of petition, specifying the particulars of the accused and the charge against him. The fiscal presents the petition to a sheriff of a competent court.³⁰ In summary procedure a warrant to arrest an accused person may also be granted under section 139 (1) of the 1995 Act on the complaint being laid before a judge of the court. The Thomson Committee recommended that in summary proceedings the fiscal should not ask for a warrant to arrest unless the whole circumstances of the case justified this.³¹

²⁷ Gane.C.H.W., & Stoddart.C.N., *Criminal Procedure In Scotland: Cases & Materials* (2nd edn W. Green/Sweet & Maxwell 1994) p. 115.

²⁸ Charles N Stoddart, *Criminal Warrants* (Butterworths, Edinburgh, 1991). p. 26.

²⁹ Ibid, p. 27.

³⁰ Gane & Stoddart supra, n. 27 p. 115.

³¹ Ibid, p. 115.

There are a number of reasons which could make the prosecutor abandon citation as a method of bringing the accused before the court and ask for a warrant to arrest him. These reasons could be that he has been unable to effect service of a citation upon the accused, or to cause the accused to be submitted to such police procedures as fingerprinting or putting him on an identification parade. The main reason for seeking a warrant to arrest in the petition, which initiates solemn proceedings, may be the seriousness of the crime.³²

The constable effecting arrest under a warrant is protected from a claim of damages for wrongful arrest, because he is acting under authority of the court. It is probably implicit in all warrants to arrest that such force may be used as is necessary to restrain the person concerned.

The constable executing the warrant to arrest is not obliged to be in physical possession of the warrant itself, but merely to be aware of its existence.³³ However, the arrested person is entitled to see the warrant as soon as possible.³⁴ Execution of a warrant to arrest does not always result in arresting the accused, because sometimes where there is no reason to fear that he will abscond if not arrested, he may be brought to the court by being warned that there is a warrant against him and being invited to attend at a certain time and place, and that is equivalent to the execution of the warrant.³⁵

Warrant to arrest witnesses

A warrant is not only issued to arrest a suspect or an accused, it may be issued for the arrest of a witness who, having been lawfully cited to attend a

³² Albert V Sheehan *Scottish Criminal 'Law and Practice Series'* (Butterworths 1990) pp. 61-62.

³³ Renton and Brown *Criminal Procedure according to the law of Scotland* (6 th edn), paraa 5-15; *Stirton v. Mcphail* 1983 S.L.T. 34.

³⁴ Renton and Brown *supra*, n. 33 para 5-15; Albert V Sheehan *supra*, n. 32 p. 62.

³⁵ *Young v. Smith* 1981 S.C.C.R. 85.

trial to provide evidence either for the prosecution or the defence fails so to attend or the circumstances of the case indicate that he intends to abscond.³⁶

In solemn cases this warrant is sought through a petition by either the prosecution or defence supported by a statement on oath that the witness has absconded or that he intends to abscond without giving evidence.³⁷

In summary cases, section 156 of the 1995 Act regulates this matter. Where a witness after being cited ignores the request to attend a trial at the date fixed without just excuse, the court may issue a warrant to arrest him. The court may also issue a warrant to arrest a witness if satisfied by evidence on oath that his attendance to give evidence is unlikely.³⁸

A warrant to arrest is usually accompanied by a warrant to search the person, dwelling- place and repositories of the accused.³⁹ The constable who possesses a warrant to arrest is, however, entitled to break open doors, but only after notifying his identity and asking for entrance from those on the premises.⁴⁰ In summary procedure, section 135(1) of the 1995 Act states that “any warrant of apprehension or search shall, where it is necessary for its execution, imply warrant to officers of law to break open shut and lockfast places”. A warrant to arrest should be executed as soon as possible.⁴¹

A warrant issued by the High Court of Justiciary is valid throughout Scotland as the High Court has universal jurisdiction. The Sheriff Court also has the same authority to grant arrest warrants which can be executed throughout Scotland.⁴²

The District Court does not have the equivalent authority with regard to the warrants issued by it. Thus, when a person is arrested on such a warrant

³⁶ Charles N Stoddart *supra*, n. 28 p. 31.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Gane and Stoddart *supra*, n. 27 p. 115.

⁴⁰ Hume, ii. 79; Renton and Brown *supra*, n. 33 para 5-15; Gane and Stoddart *supra*, n. 27 p. 125.

⁴¹ *Newall v Jessop* 1991 S.C.C.R 388; *Farquharson v. Whyte* 1886 1 white 26.

⁴² Criminal Procedure (Scotland) Act 1995 (c46), s 297.

further of the jurisdiction of the district court, he should be brought before a court in the jurisdiction in which he was arrested and detained in custody and transferred to the jurisdiction of the issuing court by the motion of the prosecutor.⁴³

A warrant of arrest issued in Scotland may be executed in England, Wales or Northern Ireland by an officer of the police force where the person is to be found. The arrested person is then detained by the officer and handed over to officers of the police force in Scotland.⁴⁴

Section (2) Arrest without warrant

In this section we will focus on the powers of arrest without warrant which are conferred upon both a constable and a private citizen. All the laws under discussion contain such powers and there is a similarity between their provisions. Moreover the similarity is clearer between provisions having similar origins, namely, between English Law and Scottish Law on the one hand and between Egyptian Law and UAE Law on the other hand.

Egyptian Law

Egyptian Law considers arrest an inquiry procedure which affects personal liberty. Thus it should be restricted and is not justified unless it is necessary in the interests of the public.⁴⁵ Therefore, arrest without warrant under Egyptian law is only permitted in cases where an offence is in progress (*flagrante delicto*) which entitles the police and other persons to arrest

⁴³ Albert V Sheehan *supra*, n. 32 para 3.09.

⁴⁴ Criminal Law Act 1977, s. 38 (1), (3).

⁴⁵ Abdul Settar. F., *supra*, n. 9 p.270.

without warrant. Thus we will discuss in turn arrest without warrant by a police officer, and arrest without warrant by other persons, as set out in the Egyptian Criminal Procedure 1950 Act.

Arrest without warrant by a police officer

Article 34 of the Egyptian Criminal Procedures Act 1950 states that a police officer, in the case of *flagrante delicto* for felonies and misdemeanours punishable by more than three months in prison, is entitled on sufficient evidence to arrest without a warrant the person present who is accused of the offence.

It appears from the article that the 1950 Act stipulates three necessarily occurring factors with regard to arrest without warrant by a police officer. First, in regard to the seriousness of the offence concerned: that it should be a felony or misdemeanour punishable by more than three months in prison. Second, that the offence concerned should be in progress, i.e. the necessity of existence of *flagrante delicto*. Third, the existence of sufficient evidence to emphasize that the present person is the person accused of the offence.

In view of the fact that arrest without warrant under Egyptian law cannot be permitted without the existence of these factors, we shall consider each of them in turn.

Seriousness of the offence

It is worth noting that offences under the Egyptian Law are divided into three categories;

- (1) Felonies, which are punishable by the death penalty; life imprisonment with hard labour; imprisonment for not less than three years and not exceeding fifteen years with hard labour; imprisonment for not less than three years and not exceeding fifteen years.⁴⁶
- (2) Misdemeanours, which are punishable by detention for a period which should not be less than twenty-four hours and not exceed three years and

⁴⁶ Egyptian Criminal Law Act 1937 Articles 10, 14, 16.

may be served with or without hard labour; a fine which exceeds one hundred Egyptian pounds.⁴⁷

- (3) Contraventions, which are punishable by a fine not exceeding one hundred Egyptian pounds.⁴⁸

As stated above, Article 34 mentions two categories of offences which entitle a police officer to arrest without warrant in the case where an offence is in progress, namely felonies and misdemeanours punishable by more than three months in prison. All contraventions and any misdemeanours punishable by three months or less are not subject to arrest without warrant.

Flagrante delicto

Article 34 of the Egyptian Criminal Procedure 1950 Act provides four cases which could form a *flagrante delicto*: witnessing of the offence during its commission; witnessing of the offence shortly after its commission; following the offender after the commission of the offence; witnessing of evidence of the offence. These are the only four cases which fall under this principle. This limitation finds its justification in the wide powers which are granted by the law to the police officer in the case of *flagrante delicto*.⁴⁹

a) Witnessing the offence during its commission

This is the clearest case of *flagrante delicto* and it exists where the acts are witnessed which form the offence, such as the offender stabbing or shooting the victim. Witnessing the offence is not limited solely to seeing the offence but it extends to the hearing or smelling of the offence whenever this is clearly done.⁵⁰

For example, the hearing of a shot together with witnessing the offender coming from the place from whence the sound had come forms a *flagrante delicto*. The same thing could be said when a police officer smells the smoke

⁴⁷ Ibid, Articles 11 (amended by Act No 169 1981), 18, 19.

⁴⁸ Ibid, Article 12 (amended by Act No 169 1981).

⁴⁹ Abdul Settar. F., supra, n. 9 pp.298,299; Husni. M.N., supra. N. 10 p. 215.

⁵⁰ Abdul Settar. F., supra, n. 9 p.297.

of hashish coming from an offender's house. On the other hand, when the witnessing of the offence is not certain, *flagrante delicto* does not exist. *Flagrante delicto* is an *in rem* matter which is concerned with the act not with the doer of the act.⁵¹ For example, *flagrante delicto* exists even when the police officer who witnessed the victim who was shot did not see the offender. There is a judicial opinion to the effect that when a police officer has reasonable grounds to believe that an offence is in progress he is entitled to arrest the suspected person even if the offence in fact was not in progress.⁵² However, this opinion is not shared by the Egyptian jurists on the grounds that *flagrante delicto* depends upon certain evidence which is obtained by witnessing an act, not upon belief established in the mind of the police officer which leads him to believe that a certain person is committing an offence.⁵³

b) Witnessing the offence shortly after its commission

This case arises from witnessing the consequences of the commission of the offence. The police officer in this case does not witness the offence during its commission, but merely witnesses the results of its commission.⁵⁴ For example, witnessing the body of the victim bleeding, or the burning of a house shortly after the offender has set fire to it. The 1950 Act did not specify the time between the commission of the offence and its discovery. It is left to the competent judge to determine whether the time which passed between the commission of the offence and the witnessing of its consequences is too long for *flagrante delicto* or not.⁵⁵

⁵¹ Ibid, p.298.

⁵² E.D.D.C.C. Cassation No. 147, 7 January 1952, p.388.

⁵³ Mustafa. M., *Sharh Qanun Al-Ijra`at Al-Jina`iyyah* (Arabic) (Explanation of the Criminal Procedures Law) 1967, p. 228; Ramadhan. O. S., *Qawa'id Qanun Al-Ijra`at Al-Jina`iyyah* (Arabic) (Principles of the Criminal Procedure Law) 1985, p.259; Srour. A. F., *Al-Ijra`at Al-Jina`iyyah* Dar Al-nehdah Al-arabia (Arabic) (Criminal Procedures) 1993, pp. 357-358; Husni. M. N., supra, n. 10 p. 535.

⁵⁴ E.D.D.C.C. Cassation No. 109, 30 April 1979, p. 514.

⁵⁵ See Abdul Settar. F., n. 9 p.300; Husni. M. N., supra, n. 10 p. 225.

c) Chasing the offender after the commission of the offence

This case assumes the victim or the public chases the offender after the commission of the offence, the mere act of shouting after the offender without pursuit being enough to consider the offence as being in progress. However, the pursuit should be shortly after the commission of the offence, so the chasing of the offender by the victim when seen the day after, does not mean that the offence is still in progress.

d) Witnessing the evidence of the offence

This case exists when the offender is witnessed while he is either carrying articles or when there are traces or marks on his clothes or body which indicate his commission of the offence, whether as principal offender or accomplice. For example, witnessing a person carrying the weapon which has been used in the commission of the offence, or witnessing him with his clothes stained by the victim's blood. The discretion of the police officer to draw from the evidence the inference that the offence is in progress is submitted to the supervision of the prosecution under the view of the competent court.⁵⁶

In the case of *flagrante delicto* the law grants the police wide powers such as arrest without warrant, and search of the accused and his property, which are clearly serious impositions upon an individual's rights. These powers are justified in the case of *flagrante delicto* due to the need to adopt immediate procedures to secure the evidence and the safekeeping of the scene of the crime.⁵⁷

Therefore the law, in order to balance the interest of the individual to protect his personal liberty with the interest of the public in discovering crimes and arresting offenders, requires that the discovery of the *flagrante delicto* should be made by the police officer himself and in a competent manner.

⁵⁶ E.D.D.C.C. Cassation No. 187, 26 November 1984, p. 829.

⁵⁷ See Abdul Setter. F., *supra*, n. 9 p.301; Husni. H. N., *supra*, n. 10 p. 229.

1) Witnessing of flagrante delicto by a police officer

Flagrante delicto should be discovered by a police officer. Therefore receiving the news of an offence from others is not enough to be sure that it is in progress and a police officer is not entitled to exercise his powers unless the police officer himself witnessed it as in any of the above cases.⁵⁸ For example, a police officer is told by his informer that X was seen dealing drugs in his house. When he visits X's house the police officer does not find any sign of the offence. Therefore merely being informed about the offence is not enough for it to be considered in progress, even when the informer is trustworthy.

On the other hand, the *flagrante delicto* does exist if the police officer is informed about the offence, and then witnesses it himself within a certain period of time.

2) Witnessing of flagrante delicto in a competent manner

In addition to an offence being in progress and a police officer witnessing it himself, the act of witnessing should be done in a competent manner, otherwise *flagrante delicto* does not exist, which means the police officer cannot exercise his powers in respect of *flagrante delicto*.

The following examples illustrate whether *flagrante delicto* is discovered in a competent manner or not. After being informed that D is in possession of drugs, a police officer went to see him. When D saw the police officer approaching he got rid of his bag which contained drugs. This case is considered a *flagrante delicto*. Thus the police officer is entitled to arrest D on the grounds that *flagrante delicto* was lawfully discovered.

If D, in the above example, got rid of the bag after he was unlawfully searched by the police officer, the discovery of the *flagrante delicto* is unlawful and the police officer has no right to arrest D.

A police officer has a warrant solely to search X's house, but he exceeded that warrant and searched D personally, finding in his pocket some drugs. In

⁵⁸ Ibid. 302.

this case the police officer has no right to arrest X because the discovery of the *flagrante delicto* was unlawful.

If the *flagrante delicto* in the above example is accidentally discovered, the police officer is entitled to arrest X, such as if the police officer asks X for his identity card and the drug fell out of X's wallet.

Sufficient evidence

A police officer, according to the provision of Article 34 of the Egyptian Criminal Procedure 1950 Act, still cannot arrest the offender unless there is sufficient evidence to accuse him, even when the offence is in progress.

Egyptian Law does not specify what is meant by 'sufficient evidence' and it seems that it leaves the question of the existence of such evidence and its sufficiency initially to the discretion of the police officer, under the supervision of the prosecution and the review of the competent court. Sufficient evidence as clarified by the Egyptian Cassation Court and jurists could be obtained from the surrounding circumstances which indicate that a certain person is guilty of an offence.⁵⁹ A police officer has discretion concerning the existence of sufficient evidence, as we have mentioned, but he should depend on things which reasonably indicate the truth of the accusation.

For example, mere information about the crime is not enough to arrest the offender; the police should first investigate the information and if the investigation shows the information to be true then the police are entitled to arrest the offender. Any confusion which may appear on an accused's face is not enough to be considered as sufficient evidence and so does not give the police the right to arrest the accused person.⁶⁰

⁵⁹ E.D.D.C.C. Cassation No. 124, 17 May 1979, p. 584.

⁶⁰ Ibid, Cassation No. 58, 28 February 1967, p. 295.

Arrest without warrant by a private citizen and public authority persons

The existence of *flagrante delicto* not only gives the police powers to arrest without warrant but also gives private persons and public authority persons similar powers. Egyptian Law does not consider such powers as arrest in its technical legal sense. Arrest by public authority persons or by a private person is considered under Egyptian Law as merely an act of physical interfering to prevent an accused person from escaping. This is imposed by necessity, where a police officer, who has the right to arrest, is not present at the scene of the crime. Although this procedure and arrest in the legal sense are both considered a restriction of private liberty, they differ in that the latter, namely arrest by a police officer, is a inquiry procedure which enables a police officer to search an accused person without warrant, while physical interfering does not confer on a private citizen or public authority persons such a right. This is what may be concluded from the interpretation of articles containing such powers. Article 37 provides that anyone who has witnessed the accused in the act of committing a felony or misdemeanour which imposes liability to detention pending investigation⁶¹ is entitled to deliver him to the nearest public authority person without warrant. Article 38 provides that public authority persons in the case of misdemeanours, which are in progress and carry liability to detention, are entitled to bring the accused and deliver him to the nearest police officer, and that they have such a right for other offences in progress if the identity of the accused is unknown.

Unlike a private person who must witness the offender in the act of committing the offence in order to be entitled to exercise his power of arrest, a public authority person is entitled to exercise such powers even when he has not witnessed the offender while the offence was in progress.

⁶¹ Detention pending investigation is provided in both Egyptian Law and UAE Law. It is an inquiry procedure which takes place after an accused person has been arrested and interrogated by the public prosecution. An accused person should not be detained pending investigation unless he has been interrogated. Detention pending investigation is granted only to the public prosecution authorities which have the power to interrogate, while the police have not such power to detain because they have no power to interrogate an accused person.

It is worth noting that a police officer has all the powers which are granted to a public authority person, as a police officer is considered to be a public authority person.

Power of delivery of the offender, whether by a private citizen or by a public authority person, is not equivalent to arrest by a police officer. Thus an offender should not be detained and he should be delivered without any delay, except for the time needed to deliver him.⁶²

The UAE Law

The UAE Penal Procedures 1992 Act regarding arrest without warrant is to a considerable extent similar to Egyptian Law, from which it, in general, derived most of its provisions.

The UAE Penal Procedure Act 1992, like the Egyptian Criminal Procedure Act 1950 permits arrest without warrant by the police, private citizens and public authority persons. However, the UAE 1992 Act extended the sphere of arrest without warrant by a police officer. Article 45 of the UAE Penal Procedure 1992 Act states that a police officer is entitled to give his order to arrest a person present at the scene who is accused of an offence when there is sufficient evidence against him in the case of:-

- a) Felonies.
- b) Misdemeanours which are punished other than by fines, when the offence is in progress.
- c) Misdemeanours which are punished other than by fines, if the accused is under observation or likely to abscond.
- d) Misdemeanours of theft, fraud, breach of trust, violent assault, breach of public decency, and misdemeanours related to arms and ammunition, alcohol and drugs.

⁶² See Abdul Setter. F., *supra*, n. 9 p. 277.

It appears that UAE law, like Egyptian law, distinguishes between offences with regard to the sentences of these offences.⁶³ The offences are classified into three categories:

- 1- Felonies, which are punishable by: a) any punishment of Shari'a law except punishment of drinking and slander. b) the death penalty. c) life imprisonment. d) imprisonment of not less than three years and not exceeding fifteen years.
- 2- Misdemeanours, which are punishable by : a) detention of not less than one month and not exceeding three years. b) fines exceeding one thousand DH . c) blood money. d) whipping as a punishment for drinking and slander.
- 3- Contraventions, which are punishable by; a) detention of not less than 24 hours and not exceeding ten days. b) fines which do not exceed one thousand DH.

Arrest by a police officer

A police officer, in accordance with the provisions of Article 45 of the 1992 Act, is empowered to arrest without warrant where various factors exist. These factors are related to a) the nature of the offence b) the existence of sufficient evidence c) the presence of the accused.

As regards the nature of the offence, Article 45 speaks of some offences in view of their seriousness, such as felonies, whether in progress or not and misdemeanours of theft, fraud, breach of trust, violent assault, breach of public decency, and misdemeanours related to arms and ammunition, alcohol and drugs. Also misdemeanours punishable by penalties other than fines when in progress, and misdemeanours punishable by penalties other than fines if the accused person is under observation or likely to abscond.

⁶³ The UAE Penal Law Act 1987, Articles 28,29,30.

It appears that the Penal Procedure Act 1992 grants the police wide powers in respect of offences, where it makes all felonies and the majority of misdemeanours “arrestable”, if we may borrow this term from English law. On the other hand, misdemeanours punishable only by fines are not within the specified offences and contraventions are not subject to arrest without warrant.

A second factor is that a police officer is entitled to arrest without warrant only when there exists sufficient evidence. As this term ‘sufficient evidence’ is entirely taken from Egyptian law, reference is made to the former discussion of Egyptian law; see page 91 above.

A third factor is that a police officer is only entitled to arrest without warrant if the accused is present. If the accused is not present the police officer in this case has to obtain a warrant to arrest him.

Arrest by a private citizen

Article 48 of the UAE Penal Procedure Act 1992 provides that any person who has seen an offender in the act of a felony or misdemeanour has the right to deliver him without warrant to the nearest public authority person.

Unlike a police officer, a private citizen has no right to deliver the offender even if there is sufficient evidence against him, unless he sees him in the act of the offence. In the case of a private citizen the law does not distinguish between misdemeanours as it does in the case of a police officer. The reason for this may be that a private citizen cannot differentiate between offences according to their sentence, and the power which is granted to a private citizen to “deliver the offender” is not as extensive as the power which is granted to a police officer to “arrest without warrant”.

Arrest by a public authority person

Article 49 of the UAE Penal Procedure Act 1992 states that, when a felony or misdemeanour punishable by a penalty other than a fine is in progress, a

public authority person has the right to arrest the offender and deliver him to the nearest police officer.

A public authority person is entitled to exercise his power under Article 49 when the offence is in progress, even if he is able to observe the offender in the act. This is unlike the case of a private citizen, who should observe the offender in the act to exercise his power under Article 48.

It appears from Articles 48 and 49 that neither a private citizen nor a public authority person can exercise their powers unless the offence is in progress (*flagrante delicto*).

The cases which form *flagrante delicto* and those required for its discovery are identical under the UAE 1992 Act and under Egyptian law. Therefore we merely refer to the discussion on Egyptian law, where *flagrante delicto* under that law is the only circumstance which gives the police and other persons the right to arrest without warrant.

The UAE 1992 Act, like the Egyptian 1950 Act, considers the powers which are granted to a private citizen and a public authority person as being merely “physical interference” which does not equate with arrest by a police officer under Article 45. The grounds on which the UAE 1992 Act adopted this distinction are the same as mentioned in the Egyptian 1950 Act.

After reviewing arrest without warrant in both Egyptian law and UAE law, it is now desirable to make a brief comparison between these laws relating to arrest without warrant.

The Egyptian law and the UAE law regarding arrest without warrant are approximately similar. However, there are some points of dissimilarity. Both laws consider arrest an inquiry procedure which is initially exercised only by the public prosecution. Nevertheless, arrest without warrant can be exercised as an exception by a police officer in some cases as we have already mentioned.

A police officer under Egyptian law can exercise arrest without warrant only on the existence of *flagrante delicto*. A police officer under UAE law can exercise arrest without warrant with the existence of *flagrante delicto* or

without as long as there is sufficient evidence against the person whom he wants to arrest. Therefore, the powers which are granted to the police officer under the UAE law in respect to arrest without warrant are wider than those granted to the police officer under Egyptian law.

In regard to powers which are granted to a private citizen and a public authority person in the case of *flagrante delicto*, there is no difference between the two laws, both consider these powers mere physical interference which is justified by necessity. The writer cannot accept the opinion that power of arrest by a private citizen or by a public authority person does not equate to arrest which is granted to a police officer on the ground that arrest by a police officer is an inquiry procedure while arrest by a private citizen or a person of public authority is mere physical interference justified by necessity. The writer believes such powers whereby a private citizen or a person of public authority can detain an accused person constitute arrest: otherwise, how can he manage to deliver the accused person to the police officer without arresting him? Moreover 'arrest' means to detain a person and deprive him of the ability to move for a while in order to carry out some measure against him. This definition of arrest applies in the case of arrest by a private citizen or a public authority person.

English Law

The law has been developed over many years in England. A feature of its development has been the increasing favour shown towards the police by the conferring of greater powers of arrest without warrant under legislative reforms.

Before the passing of the Criminal Law Act 1967, offences were classified as felonies, misdemeanours and summary offences. Arrest without warrant was permitted at common law for both a private citizen and a constable if a felony was seen being committed, and only for a constable

where he had reasonable suspicion that a felony had been committed. In the case of a misdemeanour, arrest without a warrant, whether by a constable or private citizen, was only permitted when the offence was seen to be committed. As regards a summary offence, the only way to arrest without a warrant was when a statute provided such a power of arrest.⁶⁴

The general principle at that time was that arrest should take place at the end of an investigation; arrest on reasonable suspicion at an early stage in an investigation was the exception. Generally, arrest without a warrant was prohibited unless the police intended to charge the person with the offence for which he was to be arrested.⁶⁵ The Royal Commission on Police Powers and Procedure (1929) clarified the law regarding arrest at that time, stating that the police officer should make it clear that that person was under arrest on a specific charge, “thereafter he should not question the person....although he should make a note of anything he says and should bring him straight to the police station for formal charging”.⁶⁶

In order to facilitate their inquiries about the alleged offence, the police at that time relied on the cooperation of the suspect by inviting him to the police station or asking him to accompany the constable to the police station.⁶⁷

In 1946 Judge’s Rules were issued which permitted custodial questioning following a lawful arrest even where the person had not been charged with, or informed that he would be prosecuted for, the alleged offence.⁶⁸

With the passing of the Criminal Law Act 1967, the distinction between felonies and misdemeanours was abolished by section 2 of the Act and since then offences have been divided into two categories; arrestable offences and non-arrestable offences. Arrestable offences under section 2 of the Criminal

⁶⁴ Bevan and Lidstone *supra*, n. 22 p. 239.

⁶⁵ *Ibid*, p. 215.

⁶⁶ The Royal Commission on Police Powers and Procedure (1929) para 137.

⁶⁷ Bevan and Lidstone *supra*, n. 22 p. 239.

⁶⁸ Home Office Circular 89/ 1978 rule 1.

Law Act are offences in which the sentence was fixed by law or punishable by five years imprisonment by virtue of any enactment. This definition of arrestable offences extended the power of arrest without warrant in the hands of the police, since this power could be exercised merely on reasonable suspicion. At that stage the general rule that “arrest should take place at the end of the investigation” no longer survived, and arrest on reasonable suspicion became the rule.⁶⁹ This was emphasised in *Mohammed Holgate v. Duke*⁷⁰ when a police officer arrested a person whom he reasonably suspected of burglary on the grounds that he believed she would be more likely to confess to the offence if she was arrested and taken to the police station for questioning than if she was merely questioned in her home. The House of Lords held that:

a constable was entitled to take that belief into account when deciding whether to make the arrest..... he had therefore not acted unlawfully when arresting the plaintiff.

The situation concerning the law of arrest was considered by the Royal Commission on Criminal Procedure which espoused the view that:

there is a lack of clarity and an uneasy and confused mixture of common law and statutory powers of arrest, the latter having grown piecemeal and without any consistent rationale⁷¹

and it said that it had two main objectives in its proposals:

to restrict the circumstances in which the police can exercise the power to deprive a person of his liberty to those in which it is genuinely necessary to enable them to execute their duty to prevent the commission of the offences, to investigate crimes, and to bring suspected offenders before the court; and to simplify, clarify and rationalise the existing statutory powers of arrest, confirming the present rationale for the use of those powers of arrest.⁷²

⁶⁹ Bevan and Lidstone *supra*, n. 22 p. 239.

⁷⁰ *Mohammed-Holgate v Duke* [1984] 1 All ER 1054.

⁷¹ Royal Commission on *Criminal Procedure, Law and Procedure* vol (Cmnd 8092-1 (1981)) para 3-68.

⁷² *Ibid*, para 3-75.

The Police and Criminal Evidence Act 1984, tried to create a foundation to which all powers of arrest without warrant could be referred. The PACE Act repealed all the previous statutory powers of arrest and maintained the majority of the police powers to arrest without warrant.⁷³ The PACE Act divided offences, in the context of arrest without warrant, into two categories, arrestable offences and general condition offences, both of them containing their own power of arrest without warrant. Although PACE repealed virtually all statutory powers of arrest by a constable without a warrant it did, however, preserve some of these powers.

Arrestable offences (s. 24) of the PACE Act 1984

Arrestable offences provided by section 24 of the PACE Act 1984 include:

- 1) offences for which the penalty is fixed by law (s.24 (1)(a)). These are offences such as murder and treason.
- 2) offences carrying a penalty of five or more years of imprisonment (s.24 (1)(b)). This provision expanded the scope of arrestable offences as it introduced common law offences carrying five or more years imprisonment by abandonment of the previous provision of the Criminal Procedure Act 1967 (s.2 (1)), which stated that the penalty had to arise under an enactment. Consequently, some serious common law offences formerly not arrestable offences are now considered arrestable. These offences include kidnapping, attempting to pervert the course of justice, conspiring to defraud and false imprisonment.⁷⁴
- 3) Certain offences not carrying five years imprisonment and not previously arrestable. However, some already carried powers of arrest under the statute

⁷³ Over one hundred powers of arrest without warrant were identified by the Royal Commission on Criminal Procedure. See *'Law and Procedure'* vol (Cmnd 8092-1, HMSO 1981) Appendix 9.

⁷⁴ See Zander. M., *The Police And Criminal Evidence Act 1984* (2nd edn Sweet & Maxwell 1995) p.58; Bevan and Lidstone *supra*, n. 22 p. 247.

creating them. The offences which became arrestable by section 24 (2) of the PACE Act 1984 included:⁷⁵

- *Customs and Excise offences:* section 24 (2)(a) provides for “offences for which a person may be arrested under the Customs and Excise Acts, as defined in section 138 (1) of the Customs and Excise Management Act 1979”. Section 138 (1) of the Customs and Excise Management Act 1979 provided that a person reasonably suspected of committing any of these offences may be arrested by customs and excise officers, a constable, a member of Her Majesty’s Armed Forces, or a coast guard, within three years of the commission of the offence. This provision did not effectively impose a time limit on the power of a constable to arrest summarily after these offences became arrestable by virtue of the PACE Act. However, customs officers are still restricted by the limited time imposed by the 1979 Act.
- *Official Secrets Act offences:* section 24 (2) (b)(bb) of the PACE Act made most of the Official Secrets Act (1911, 1920, 1989) offences arrestable.
- *Sexual offences:* offences under section 22 (causing prostitution of women) and section 23 (procurement of girls under 21) of the Sexual offences Act 1956 are made arrestable by section 24 (2) (c) of the PACE Act 1984. Regarding indecent assault on a woman under section 14 of the 1956 Act, its punishment was increased to 10 years whatever the age of the woman. Therefore the offence now follows the arrestable offences under section 24 (2) (b).
- *Theft Act offences:* section 24 (2) (d) joined two theft offences and made them arrestable (taking a motor vehicle or other conveyance without authority s. 21 (1) of the Theft Act 1968 and being equipped for stealing s.25 (1) of the same Act), because both are frequently committed offences.
- *Football offences:* the Football Offences Act 1991 added paragraph (e) to section 24 (2) of the PACE Act which made any offences under the 1991 Act arrestable. These offences are:

⁷⁵ See Bevan and Lidstone *supra*, n. 22 pp. 248-252.

(i) throwing things at or toward (a) the playing area or adjacent area not open to spectators, or (b) any area in which spectators or other persons may be, without lawful authority or excuse (which shall be for the accused to prove) s. 2;

(ii) taking part in chanting of an indecent or racist nature s. 3;

(iii) going into the playing area, or an adjacent area to which spectators are not normally admitted, without lawful authority or excuse (which shall be to the accused to prove) s. 4.

- *Offences under the Obscene Publications Act 1959 and the Protection of Children Act 1978:* Section 85 of the Criminal Justice and Public Order Act 1994 makes the offences under section 2 of the Obscene Publications Act 1959 and section 1 of the Protection of Children Act 1978 arrestable offences. These offences also became 'serious arrestable offences' by adding them to the list of such offences under section 116(2)(b) of the PACE Act 1984.

- *An offence under section 166 of the Criminal Justice and Public Order Act 1994:* Section 166 of the CJPO Act 1994 makes it an offence for an unauthorised person to sell, or offer or expose for sale, a ticket for a designated football match in a public place or place to which the public has access or in the course of a trade or business, in any other place. The offence is made arrestable by adding it to the list of offences under section 24(2) of the PACE Act 1984.⁷⁶

- *An offence under section 19 of the Public Order Act 1986:* Section 115 of the Criminal Justice and Public Order Act 1994 makes the offence provided by section 19 of the Public Order Act 1986 arrestable. The offence is publishing and distributing written material which is threatening, abusive or insulting and which either intends to stir up racial hatred, or is likely to do so.

- *An offence under section 167 of the Criminal Justice and Public Order Act 1994:* Section 167 of the CJPO Act 1994 makes it an offence, in public

⁷⁶ Section 166(4) of the Criminal Justice and Public Order Act 1994.

places, to solicit persons to hire vehicles to carry them as passengers unless a licensed taxi or acting with the authority of the holder of a RSV licence. The offence is made arrestable by adding it to the list of offences under section 24(2) of the PACE Act 1984.⁷⁷

4) Conspiracy, attempting, inciting. Section 24 (3) of the PACE Act 1984 provided that “without prejudice to section 2 of the Criminal Attempts Act 1981, the powers of summary arrest conferred by the following subsections shall also apply to the offences of-

- (a) conspiring to commit any of the offences mentioned in subsection 2 above;
- (b) attempting to commit any such offence other than an offence under section 12 (1) of the Theft Act 1968;
- (c) inciting, aiding, abetting, counselling or procuring the commission of any such offences are also arrestable offences for the purposes of this Act”.

Section 24 was not confined to making only offences under subsection 2 arrestable but it also made conspiracy, attempting, aiding, a betting, counselling or procuring of these offences arrestable, with the exclusion of the offence of attempting to commit an offence under section 12 (1) of the Theft Act 1968 (taking and driving away a motor vehicle....). The reason for this is that such an offence is covered by the Criminal Attempts Act 1981.⁷⁸

An analytical view of the development of arrest shortly before and after the passing of the PACE Act 1984 shows a strong tendency to make most offences, whether common law or statutory offences, arrestable. Two objectives may have been achieved by making offences arrestable. First, a constable in respect of an arrestable offence can summarily arrest without a

⁷⁷ Section 167(7) of the Criminal Justice and Public Order Act 1994.

⁷⁸ Sections (1) and (2) (e) of the Criminal Attempts Act 1981 provides that any provision in any enactment (whenever passed) conferring a power of arrest in respect of the offence shall have effect with respect to the offence of attempting to commit that offence.

warrant.⁷⁹ Second, he may enter and search the arrestee or any premises without a warrant following the arrest.⁸⁰

Powers of arrest for arrestable offences under the PACE Act 1984

Powers of arrest in respect of arrestable offences are divided into two categories: those which anyone (including a constable) may exercise and those which can be used only by a constable.

1) Powers of arrest by a private citizen (s.24 (4) and (5))

Subsection 4 (a) provides that any person may arrest without a warrant anyone who is in the act of committing an arrestable offence. Here there is no place for suspicion; either the suspect is committing the offence, and the arrest is lawful, or he is not, and the arrest is unlawful. Unlike subsection 4 (a), subsection 4 (b) expands the power of arrest in regard to a private citizen, since it entitles him to arrest without a warrant merely on suspicion. It provides that any person may arrest without a warrant anyone whom he has reasonable ground for suspecting to be committing an arrestable offence. Accordingly, even if in fact the suspect was not in the act of committing an arrestable offence, that does not affect the legitimacy of the arrest.

Section 24 (5) provides that “where an arrestable offence has been committed, any person may arrest without a warrant a) anyone who is guilty of the offence b) anyone whom he has reasonable grounds for suspecting to be guilty of it”. It appears from this that an arrestable offence should first be committed to authorise a private citizen to effect arrest without a warrant either against the person who is guilty of the offence or whom he has reasonable grounds for suspecting to be guilty of it. Accordingly, the arrest is only lawful if it transpires that such an offence has in fact been committed. If it eventually turns out that no offence has been committed, the person who made the arrest will be liable for false imprisonment. This was what was held

⁷⁹ Summary means with despatch and without formalities.

⁸⁰ Section 18 of the PACE Act 1984 permits the entry and search of any premises without a warrant following arrest for an arrestable offence.

in *Walters v. W H Smith & Sons Ltd.*⁸¹ The facts of the case can be summarised: D reasonably suspected that X had stolen a particular book from his stall and arrested him under the powers of common law.⁸² Another book had in fact been stolen but not the particular book, therefore no felony⁸³ had been committed in respect to it. D was held liable to damages. Contrarily, when a private citizen arrests without a warrant any person who is in fact guilty of an arrestable offence the arrest is lawful, even though that person had no reasonable grounds for suspecting that the arrestee had committed the offence. In addition, where reasonable grounds exist that an arrestable offence is committed by someone the arrest is still lawful even though the person arrested did not commit that offence. For example, a store detective arrests four youths reasonably suspected of stealing from the store. Three are subsequently acquitted, the fourth is convicted. The conviction proves that an arrestable offence has been committed; accordingly the arrest of those acquitted was lawful under section 24 (5) (b).⁸⁴

2) Powers of arrest by a constable (s.24 (6) and (7))

A constable has all the powers of a private citizen to effect arrest but, in addition, he has certain other powers. Section 24 (6) confers on a constable the power to arrest without a warrant when he has reasonable grounds for suspecting that an arrestable offence has been committed, and when he has reasonable grounds for suspecting the person to be guilty of the offence. This means that arrest under this subsection is lawful, even where his suspicion is not correct, in respect of the existence of the offence or guilt of the person whom he has arrested. This power is wider than that of a private citizen which is restricted to cases in which an arrestable offence has actually been committed. Thus, in the case of *Walter v. W H Smith* above, a constable

⁸¹ *Walters v W H Smith and Sons Ltd* [1914] 1K B 595.

⁸² Which is now found in s.24 (5).

⁸³ Which is now an arrestable offence.

⁸⁴ See Bevan and Lidstone *supra*, n. 22 p. 257.

would have been safe in arresting X while D was not. Moreover, a constable is entitled by virtue of section 24 (7) to arrest without warrant a) anyone who is about to commit an arrestable offence; b) anyone whom he has reasonable grounds for suspecting to be about to commit an arrestable offence. In the case of (a) the situation is clear that either the person is about to commit such an offence, and the arrest is lawful or he is not, and the arrest is unlawful. In the case of (b) it depends on the reasonable grounds which prompted the constable to suspect that that person was about to commit an arrestable offence.

General arrest conditions (s. 25) of the PACE Act 1984

Section 25 gives the police a new wider power of arrest other than in respect of arrestable offences. This power is restricted by the existence of certain conditions.⁸⁵ It provides that where a constable has reasonable grounds for suspecting that any offence which is not an arrestable offence has been committed, or attempted, or is being committed or attempted, he may arrest any person (the relevant person), whom he has reasonable grounds to suspect of : a) having committed, b) having attempted to commit, c) being in the course of committing or attempting to commit the offence concerned; and it appears to him that the service of a summons is impracticable or inappropriate because any one of the general arrest conditions are satisfied. The general arrest conditions as provided in s. 25 (3) are :

- (a) that the name of the relevant person is unknown to, and cannot be readily ascertained by the constable;
- (b) that the constable has reasonable grounds for doubting whether a name furnished by the relevant person as his name is his real one;
- (c) that :
 - (i) the relevant person has failed to furnish a satisfactory address for service; or

⁸⁵ See Anna Lawson *Whither the General Arrest Conditions?* [1993] Crim LR 567.

- (ii) the constable has reasonable grounds for doubting whether an address furnished by the relevant person is a satisfactory address for service;
- (d) that the constable has reasonable grounds for believing that arrest is necessary to prevent the relevant person from:
 - (i) causing physical injury to himself or any other person;
 - (ii) suffering physical injury;
 - (iii) causing loss of or damage to property;
 - (iv) committing an offence against public decency; or
 - (v) causing an unlawful obstruction of the highway;
- (e) that the constable has reasonable grounds for believing that arrest is necessary to protect a child or other vulnerable person from the relevant person.

Accordingly, a constable before using his discretion to arrest under section 25 should take into account first, whether the offence is arrestable where he can rely on section 24 to effect arrest or is an offence which carries a preserved power of arrest by Sch 2 (discussed below); second, whether it is possible to serve a summons instead of arresting the suspect. If a constable decides to arrest the suspect he should be satisfied as to the existence of the conditions stated above.

The general conditions above can be divided into two categories:

1) General arrest conditions where the constable does not know and cannot ascertain the name or address of the suspect or where he reasonably believes that the name and address he has been given are false or he doubts whether the suspect has given a satisfactory address for service of a summons. The question which arises here is, what is a satisfactory address for such service? This is answered in section 25 (4) where it states “an address is a satisfactory address for service if it appears to the constable-a) that the relevant person will be at it for a sufficiently long period for it to be possible to serve him with a summons; or b) that some other person specified by the relevant person will accept service of a summons for the relevant person at it.”

It cannot be said that a constable reasonably doubts that the relevant

person has given his correct name and address merely because in his experience people who commit crimes usually do not give correct details.⁸⁶ The constable is not obliged to inform a suspect why he wants his name and address. He must, however, tell the suspect what offence he is suspected of.⁸⁷

2) General arrest conditions for prevention and protection:-

(a) where a constable has reasonable grounds for believing that arrest is necessary (i) to prevent the suspect causing physical harm to himself or to others. For example, if the relevant person is in possession of an offensive weapon and is reasonably believed to be likely to use the weapon to harm himself or another; (ii) to prevent the relevant person suffering physical injury. For example, to protect the suspected offender from the victim's relatives where they are likely to attack him physically; (iii) to prevent the relevant person causing loss of or damage to property. The power under (iii) is applied only where the loss or damage relates to the relevant person's own property; if it relates to the property of others, the arrest will then be justified under s. 24 (6), since causing criminal damage is an arrestable offence; (iv) to prevent the relevant person committing an offence against public decency. This offence should take place in circumstances where members of the public going about their normal business cannot reasonably be expected to avoid the person to be arrested. Indecent exposure constitutes the most common offence against public decency; (v) to prevent the relevant person causing obstruction of a highway. This situation could happen where the relevant person unlawfully sits down in the highway and ignores a police request to move. In this case a constable is entitled to arrest him under s.25 (3) (v).

(b) Where a constable has reasonable grounds for believing that arrest is necessary to protect a child or another vulnerable person. For example, to protect a girl from gross indecency by her stepfather. Here it is worth noting that most sexual offences against a child are arrestable.

⁸⁶ *G v Director of Public Prosecutions* [1989] Crim L R 150.

⁸⁷ *Nicholas v Parsonage* [1987] R.T.R 199.

Preserved power of arrest (s. 26) of the PACE Act 1984

Section 26 (1) repeals virtually all prior statutory powers of arrest by a constable without a warrant. It states “ ..., so much of any Act (including a local Act) passed before this Act as enables a constable - (a) to arrest a person for an offence without a warrant; or (b) to arrest a person otherwise than for an offence without a warrant or an order of a court, shall cease to have effect.”

Subsection (2) of the same section excluded some statutory powers of arrest by providing that “ Nothing in subsection (1) above affects the enactments specified in Schedule 2 to this Act”. This is the only express exception to the term of subsection (2). However, there are other implied exceptions, first the common law offences (which are discussed below), second, statutory powers of arrest given to ‘any persons’ who are not constables, who are not subject to the term of subsection (1). In addition, constables come within the definition of ‘any person’, therefore any powers which permit ‘any persons’ to arrest without warrant are unaffected by subsection (1).

In *D.P.P.v. Kitching*⁸⁸ the respondent was arrested and charged with being drunk and disorderly in a public place contrary to s.91 of the Criminal Justice Act 1967 and with assaulting a constable in the execution of her duty. The charge was dismissed on the grounds that s.91 of the C.J.A 1967 had been repealed by s.26 of the PACE. The arrest was therefore unlawful.

The High Court of Justice, after reviewing the provisions of s.91 of C.J.A and s. 25 (1) (6), s. 26, and paragraph 21 of schedule 6 of the PACE Act 1984, stated that

It was apparent that the PACE had, in terms, provided that the arrest powers conferred under section 91 of the 1967 Act survived. Any other reading was impossible and it was noteworthy that section 91 CJA 1967 was not included in the repeal schedule of PACE. Thus, section 26 did not repeal the constable’s powers of arrest, and assuming they survived it was plain that they were unaffected by section 25 by reason of the express provision in section 25. Thus, the justices had erred in their conclusion.

⁸⁸ *Director of Public Prosecutions v Kitching* [1990] Crim L R 395.

Common law powers of arrest

At common law, a constable or any person may arrest without warrant for a breach of the peace. This power of arrest was not affected by section 25 (6) and section 26 of the PACE Act.⁸⁹ A breach of the peace occurs wherever harm is actually done or is likely to be done to a person, or in his presence to his property, or where he is in fear of being harmed by an assault, riot or other disturbance.⁹⁰

A breach of the peace requires violence, therefore, for example, a mere loud noise and boisterous behaviour is not a breach of the peace. A constable and any citizen have power of arrest for a breach of the peace where it has been committed in the presence of the arrestor and he reasonably believes that a breach would be committed in the immediate future or where a breach has been committed and it is reasonably believed that another is threatened.⁹¹ Professor Leigh summarises the common law power of arrest as follows:

A constable has power at common law to arrest without warrant any person whom he sees breaking the peace or who so conducts himself that he causes a breach of the peace to be reasonably apprehended. If no breach of the peace is imminent the most that a constable can do is to admonish the persons concerned to keep the peace. A constable cannot justify any arrest after the breach of the peace has terminated unless he is in fresh pursuit of the offenders or reasonably apprehends a renewal of the breach of the peace.⁹²

The police frequently use powers of arrest for breach of peace to maintain public order.⁹³

⁸⁹ *Director of Public Prosecutions v Orum* [1989] 3 ALL E R 449; *McConnell v Chief Constable of Greater Manchester Police* [1990] 1 ALL E R 423.

⁹⁰ *R v Howell* [1981] 3 All ER 383.

⁹¹ *Ibid.*

⁹² L Leigh *Police Powers in England and Wales* (2nd edn Butterworths 1985) p. 184 and cases cited therein.

⁹³ See Robilliard and McEwan *Police Powers and the Individual* 1986 pp. 36 et seq.; A.T.H. Smith *The Offence Against Public Order* 1987, p. 7.

Powers of arrest for fingerprinting (s. 27) of the PACE Act 1984

Before the coming into force of the PACE Act 1984, the police had no compulsory powers to take fingerprints of the investigation stage. This power could only be exercised on the authority of a magistrate and in certain limited circumstances.⁹⁴

Section 27 of the PACE Act now gives the police power to arrest for fingerprinting any person who has been convicted of a recordable offence⁹⁵ within one month of the conviction, if he has not at any time been in police detention for the offence and has not had his fingerprints taken in the course of the investigation of the offence by the police or since the conviction. This power should only be exercised after a constable has required the person concerned to attend the police station within seven days and he does not comply with the request. The constable is then entitled to arrest him in order to take his fingerprints.

Power of arrest for failure to answer bail: (s. 46A) of the PACE Act 1984

A constable is entitled to arrest without warrant any person who, having been released on bail under Part IV of the 1984 Act subject to a duty to attend a police station, fails to attend at the appointed time.⁹⁶ The power of arrest applies even when the release of the person was before the commencement of the 1984 Act.⁹⁷

Power of arrest to obtain samples: (s. 63A) of the PACE Act 1984.

This power of arrest is also inserted into the 1984 Act by the Criminal Justice and Public Order Act 1994 (s. 56). Section 63 of the 1984 Act authorises a constable to arrest without warrant any person who fails to comply with a

⁹⁴ Zander. M., *supra*, n. 74 p. 64.

⁹⁵ An offence which is listed in the National Police Records (Recordable Offences) Regulations 1985, SI 1985 No 1941, as amended by SI 1989 No 694. The offences include all offences punishable with imprisonment, loitering or soliciting for the purposes of prostitution, improper use of a public telecommunications system and tampering with motor vehicles.

⁹⁶ This power of arrest was inserted into the 1984 Act by section 29 of the Criminal Justice and Public Order Act 1994.

⁹⁷ The Criminal Justice and Public Order Act 1994 s. 29(5).

requirement to attend a police station to have a sample taken.⁹⁸ Persons who must submit to such a requirement must not at that time be in police detention or held in custody by the police or the authority of a court, and they must have:⁹⁹

- a) been charged with a recordable offence or informed that they might be reported for such an offence; and
- b) either not had a sample taken from them in the course of the investigation of the offence by the police, or have had one taken which either proved not suitable for the same means of analysis or, though suitable, proved insufficient.

Post-PACE Act 1984 statutory powers of arrest

A variety of powers of arrest have been created since the passage of the 1984 Act. Among these are powers of arrest which are provided by the Criminal Justice and Public Order Act 1994, and the Road Traffic Act 1988. The latter provides power of arrest without warrant and makes some of its offences being arrestable.¹⁰⁰

Scottish Law

Arrest without a warrant under Scottish law is still, in general, governed by common law rules. Although the Criminal Justice (Scotland) Act 1980 created new rules for detention short of arrest, the Act did not make any change in the general law of arrest. There is no such clear rule in the common law regarding arrest without warrant. The Scottish law makes no distinction between felony and misdemeanour, or between arrestable and non-arrestable offences.¹⁰¹ This is unlike the situation in English law which does make such

⁹⁸ The PACE Act 1984 s. 63A(7).

⁹⁹ Ibid, s. 63A(4).

¹⁰⁰ See the CJPO Act 1994 ss. 61, 63, 65, 68, 69, 76. The CJPO Act 1994 also inserted new sections into both the Public Order Act 1986 and the Criminal Law Act 1977 which granted the police powers to arrest without warrant. (See ss. 70, 73 of the CJPO Act 1994.)

¹⁰¹ Renton and Brown *supra*, n. 33 para 7-01.

a distinction between arrestable and non-arrestable offences in respect of which differing powers of arrest without warrant are conferred. The general principle in respect of arrest without warrant in Scotland is that arrest is permitted where it is necessary in the interests of justice. Moreover, arrest may be more easily justified the more serious the offence.¹⁰² This general principle, which dominates the law of arrest without warrant, applies in both common law offences and statutory offences.

Arrest without warrant for common law offences

Following the general principle of arrest a constable has power to arrest an offender without a warrant where this is necessary in the interests of justice. A constable who arrests a person unnecessarily could face civil action for damages if the arrested person challenges this action. Therefore, a constable should take into account before making the arrest whether his act is necessary in the interests of justice. The question which arises here is, how could the constable know when the arrest is necessary in the interests of justice? This is what Lord Deas answered in *Peggie v. Clark*¹⁰³ when he mentioned the cases in which a constable is entitled to arrest without a warrant.

If a policeman or constable sees a crime committed, it is his duty to apprehend the criminal at once; or if the criminal is pointed out to him running off from the spot, the same rule would apply. If, again, the criminal is in hiding, or the officer is credibly informed, or has good reason to believe, that he is about to abscond, the officer may *de plano* apprehend him, to prevent justice from being defeated. The same thing would hold if the crime believed to have been committed was murder or the like, the very nature of the punishment of which would render absconding the probable and natural result of the crime itself. Still further, if a suspected individual belongs to a class of persons reputed to live by crime, or who have no fixed residence or known means of honest livelihood, in all such cases a police-officer or constable has large powers of apprehending without a warrant.

From this case two important factors could be inferred regarding arrest without warrant in common law; namely, the matters which are necessary in

¹⁰² Ibid; *Peggie v Clark* (1868) 7M. 89.

¹⁰³ *Peggie v Clark* supra.

the interests of justice and the conditions which make a constable's conduct justifiable -

- a) Things which are necessary in the interests of justice such as preventing the arrestee absconding, or committing further crimes, or hindering the course of justice by interfering with witnesses or disposing of stolen property or other evidence.¹⁰⁴
- b) The conditions which make the reasonable belief of the constable justified, such as the arrestee's character, the fixity or otherwise of his residence, or the seriousness of the offence such as murder, may justify the arrest. The arrest of persons of the criminal class or with no means of honest livelihood or fixed abode is more easy to justify than the arrest of a respectable householder.¹⁰⁵

Arrest without warrant becomes unjustifiable where the interests of justice could be served by waiting for a warrant or by citation.¹⁰⁶ Moreover, minor offences are not enough to justify arrest without warrant; it should be supported by the belief of the constable that arrest is necessary without waiting for a warrant. One thing which could make arrest without warrant difficult to justify is the elapse of a long period of time since the commission of the offence.¹⁰⁷

Arrest by private citizen

Arrest without warrant at common law could be carried out by both a constable and a private citizen. However, the cases which entitle the private citizen to make an arrest without warrant are more restricted than those which entitle the constable to arrest without warrant. The circumstances in which a private citizen may arrest without warrant are where he witnesses the commission of a serious offence, or where he has been the victim of the

¹⁰⁴ Renton and Brown *supra*, n. 33 para 7-02.

¹⁰⁵ *Ibid*; Albert V Sheehan *supra*, n. 32 para 3-04.

¹⁰⁶ Renton and Brown *supra*, n. 33 para 7-02.

¹⁰⁷ *Ibid*.

offence and he has information from an eye-witness pointing out to him the fleeing criminal. Moreover, a private citizen who himself does not have a right to arrest may assist someone who has such a right, albeit that person is another private citizen or a constable.¹⁰⁸ A private citizen when arresting a person must hand him over to the police as soon as possible. The police constable would then decide whether to arrest the suspect or to detain him under section 14 of the 1995 Act, depending on the circumstances of the case.

As mentioned, the cases where a private citizen can arrest without warrant are restricted. Therefore a private citizen should be careful when arresting a suspect and he should be aware of the circumstances surrounding the offence, otherwise he may face the possibility of an action of damages for unlawful arrest. In *Codona v. Cardle*¹⁰⁹ the appellant was convicted of assaulting the complainer by twisting his arm. The circumstances were that the complainer was pointed out to the appellant by one of the latter's employees as the person believed to have broken a window in the appellant's premises a short time before. The appellant purported to arrest the complainer, who was reluctant to go with him. The appellant then twisted the complainer's arm up his back. The appellant appealed to the High Court against conviction on the ground that his action was a justifiable exercise of his rights. Lord Justice-Clerk (Ross), after referring to the circumstances where a private citizen may arrest without warrant as mentioned in *Renton and Brown*, stated:

....having regard to the terms of the finding in this case, we are not satisfied that the appellant has brought himself within any of the categories described in the passage. He had not witnessed the breaking of the window. Since he was in partnership with his father in the arcade he was in a sense the victim of the crime, but on the basis of the finding it cannot be affirmed that he had any information equivalent to personal observation.....In these circumstances we are not satisfied that the appellant was entitled to pursue the complainer as he did.

¹⁰⁸ Ibid; Albert V Sheehan supra, n. 32 para 3-05.

¹⁰⁹ *Codona v Cardle* 1989 S.C.C.R.287; Gane and Stoddart supra, n. 27 p. 118.

A private citizen does not have the power to arrest a person whom he suspects of breach of the peace and he also has no right to arrest any person for a statutory offence.¹¹⁰

Renton and Brown mention a situation where arrest could be effected by someone other than a constable or a private citizen:

Justices of the peace, being magistrates, have certain powers of peremptory arrest. A magistrate may arrest without warrant in the case of a serious crime, riot or breach of the peace, committed within his jurisdiction, which he has witnessed or of which he has received an immediate complaint, provided that the circumstances are such that the offender would escape if there were any delay. He may also in such circumstances issue a verbal order to others to arrest the offender.¹¹¹

Arrest by a constable

Unlike a private citizen, a constable has wider powers of arrest without warrant in the common law, under which most arrests are carried out by police constables.

A constable may arrest a person suspected of the offence where that offence is being committed or attempted in his presence, or violence is being threatened. He may also arrest without a warrant when he sees the offender absconding from the scene of the crime. In addition, a constable is entitled to arrest without a warrant on credible information that a serious crime has been recently committed or attempted if the offender is likely to abscond.¹¹²

Where a constable is entitled to arrest without a warrant for a serious offence he is also entitled to enter premises without a warrant in order to effect arrest in the case where his entrance is refused.¹¹³

¹¹⁰ Renton and Brown *supra*, n. 33 para 7-03; Albert V Sheehan *supra*, n. 32 para 3-05.

¹¹¹ Renton and Brown *supra*, n. 33 para 7-04.

¹¹² *Ibid*, para 7-05; *Peggie v Clark* *supra*, n. 102

¹¹³ Renton and Brown *supra*, n. 33 para 7-05.

Arrest without warrant on reasonable grounds

The question which arises after the discussion of common law powers of arrest is whether or not the common law permits arrest without warrant on 'sole suspicion'. Common law is unclear on this point. However, this situation, from the point of view of some Scots writers, does not cause problems since a constable can now rely on section 14 of the Criminal Procedure (Scotland) Act 1995 to attain his object to collect further information.¹¹⁴

In the case of *Johnston v. H M Advocate* 1993 SCCR 693 the appellant was interviewed by the police in connection with a murder. In his statement under caution he admitted assaulting the deceased. He was then arrested and requestioned under caution on tape before being charged. At the trial, objection was taken to the admissibility of the evidence of the questioning on the ground that, as the appellant had been arrested, it was not open to the police to question him further. The appellant was convicted and appealed to the High Court.

In the High Court the Lord Justice Clerk (Ross) stated that:

I agree with the trial judge that arrest may be justified on less material than is required to charge, and that there is no justification for a general rule of law that arresting a person would debar the police from ordinary questioning provided that the questioning was not unfair. In the present case the appellant was arrested and told the general nature of the charge on which the arrest was made. Thereafter in my opinion the police were entitled to question the appellant provided the ordinary rules of fairness were observed.

Lord Murray pointed out that:

A suspect who was arrested but not yet formally charged was in an intermediate position, as was a suspect detained under section 2 of the 1980 Act; and both could be properly questioned by police, subject to any incriminating answers being excluded if, in the circumstances, it would be unfair to admit them.....It was not argued in the present appeal that the effect of legislation introducing detention under section 2 of the 1980 Act was to displace any common law rule which might previously have allowed incriminating answers elicited by police questioning to be

¹¹⁴ Ibid; Gane and Stoddart *supra*, n. 27 p. 118.

admissible in evidence if elicited after an accused was arrested but before he had been formally cautioned, charged and taken into custody.

This case brought up an important issue which was and still is causing thorny legal arguments, namely, whether or not the police after arresting an accused have the right to question him. It appears from the decision of this case that the answer is in the affirmative. This decision per se leads us to consider two critical matters. First, that the police could rely on reasonable grounds to exercise powers to arrest people; second, as a result of this, the utility that section 2 of the 1980 Act (now section 14 of the 1995 Act) has, in conferring upon the police powers to detain a person whom they suspect of having committed a crime. This study will try to deal with the above matters as follows.

Section 14 of the 1995 Act to a great extent follows the recommendation of the Thomson Committee “that a person could not be lawfully arrested without being charged, so that it was necessary to provide the police with an opportunity to detain a suspect without arresting, so that they might question him. [Criminal Procedure in Scotland (2nd report) 1975, Cmnd 6218, para. 3.07].

When the Thomson Committee recommended that the police should be granted such powers to detain they tried to avoid the restriction produced by *Chalmers v. H M Advocate* 1950 J.C.66 on police powers to question a suspected person who has been arrested. In that case Lord Justice General Cooper stated that:

putting aside the case of proper apprehension without a warrant of persons caught more or less red-handed, no person can be lawfully detained except after a charge has been made against him.

This is a complex and controversial case. There are two points of view regarding arrest without warrant on reasonable grounds. The first is that common law is unclear about arresting without warrant on reasonable grounds of suspicion and, accordingly, in order to avoid facing a prospective civil action for unlawful arrest, a constable when not confident that the

person whom he has suspected has committed an offence should rely on section 14 of the 1995 Act.¹¹⁵

The second point of view is that the power of arrest on reasonable grounds existed at common law even before *Johnson's case*. Such a view can be deduced from an article written by James Watson.¹¹⁶ He submits that:

there was already a power of arrest available, at common law, to handle a situation with which the 'innovatory' section 2 was supposedly intended to cope.

The points with which he demonstrated his view could be summarised as follows:

1. That under common law a constable has the right to arrest without warrant any person whom he sees committing a common law crime. He has the same right in the situation where he is informed by another who is sure of the fact that such a crime is being committed by that person. The writer believes that the information which is received by a constable from a credible witness is equal to reasonable suspicion in the constable's mind.
2. That the main purpose of section 2 is to enable a constable to question the suspect before arresting him. However, questioning the suspect is subject to the principle of fairness and not to whether the suspect was under arrest or merely under detention.

It is not open at common law to the police to arrest anyone they choose under any circumstances. Thus, in the case of arrest without warrant on reasonable suspicion under common law, a constable is obliged to justify his conduct, otherwise he may be liable to damages.

The same writer in his comment on *Johnson v. H M Advocate* re-emphasises what was said in the previous article. In addition, he submits that:

I did not pursue quite so much the question of *when* one should be (or ought to be) charged after being so arrested. I did not do so because it seemed to me clear that when a constable was in the position to arrest on

¹¹⁵ Gane and Stoddart *supra* n. 27 p. 118.

¹¹⁶ James Watson *Police Powers: Detention or Arrest, a Legal Complication* (1988) 33 J L S S 29.

reasonable suspicion that a crime had been committed, that de facto implied that he was also in the position to caution and charge the arrestee as soon as the practicalities of the situation allowed, and that there need not normally be any real delay between the one event and the other.¹¹⁷

I find myself in agreement with the writer on most of what he has submitted. Nevertheless, I would not dismiss section 14 of the 1995 Act as worthless. The point which supports my view can be found in the difficulty of drawing a clear line between fair questions which are admissible in evidence and unfair questions which are inadmissible in evidence. This differs from one case to another. Therefore, despite the decision of *Johnson v. H M Advocate*, a constable still needs to rely on section 14 to reassure himself where he is not sure of the strength of the reasonable grounds for arrest.

Now it is apparent that the police could arrest a person whom they suspected on reasonable grounds to have committed a crime, and they might question him afterwards, provided that the ordinary rules of fairness were observed.

Arrest without warrant for statutory offences

Statutory offences do not differ from common law offences since Scottish law does not make a distinction between such types of offences. Therefore, statutory offences are subject to the same general principle which dominates common law offences regarding arrest without warrant, namely, arrest without warrant is not justified unless necessary in the interest of justice.¹¹⁸ Some Acts include powers of arrest without warrant in their provisions. Although other statutes do not expressly confer such powers, the police frequently exercise the power of arrest without warrant under them.¹¹⁹

¹¹⁷ James Watson *Detention or Arrest Revisited* Scottish Law Gazette 1996 vol. 64, No. 1 p. 6.

¹¹⁸ Albert V Sheehan *supra*, n. 32 para 3-06; Renton and Brown *supra*, n. 33 para 7-08.

¹¹⁹ Albert V Sheehan *supra*, n. 32 para 3-06; Renton and Brown *supra*, n. 33 para 7-08.

One of the most relevant statutes which provides powers of arrest without warrant is the Civic Government (Scotland) Act 1982. Section 59 of the Act states that a constable may where it is necessary in the interests of justice arrest without warrant a person whom he finds committing one of the following offences against that Act: drunkenness in a public place (section 50), being in or on a building or other premises in circumstances inferring intent to steal (section 57), and being a convicted person found in possession or recent possession of equipment for theft (section 58).

Section 59 (3) provides that the owner, tenant or occupier of any property in, or in respect of which any of these offences is being committed, or any person authorised by him, may apprehend any person he finds committing that offence and detain him until he can be delivered to a constable.

Arrest without warrant on reasonable grounds

The terms of section 59 of the Civic Government Act 1982 indicate that a constable can arrest a person whom he finds actually committing an offence. In *Nicol v. Lowe*¹²⁰ the terms of section 59 were given a wide interpretation where the court held that:

s.59 (1) fell to be construed as meaning that a constable is entitled to arrest without warrant a person whom he has reasonable grounds to believe is committing an offence.

In this case the appellant was seen by constables coming out of the driveway of a private house shortly after midnight and was arrested for a contravention of s.57 of the 1982 Act. He was subsequently searched and found in possession of incriminating articles. At his trial, objection was taken to evidence of those articles being led on the ground that the arrest was not justified, since the police had no reasonable grounds to suspect the commission of an offence by the appellant. The sheriff repelled the objection, admitted the evidence and convicted the appellant.

¹²⁰ *Nicol v Lowe* 1989 S.C.C.R.675.

The High Court held that given the state of knowledge of the constables in the case, there being no evidence of suspicious behaviour by the appellant, no such grounds existed, and the arrest was unjustified.

In addition, *Mcleod v. Shaw*¹²¹ dealt with a situation related to the Road Traffic Act 1972. In this case an experienced police sergeant found the respondent in the driving seat of a car which was stationary some four feet from the kerb. She asked him to leave the car. She formed the opinion that he had been drinking and that his ability to drive was impaired, and arrested him on a charge of contravening s. 5 (2). At the respondent's subsequent trial for a contravention of s. 6 (2) of the Road Traffic Act 1972 (being in charge of a vehicle with an excess of alcohol in one's blood), the Crown relied on a laboratory analysis taken under s. 9 of the said Act which was admissible only if the respondent had been lawfully arrested by the sergeant. She gave evidence that the respondent had to steady himself when he left the car. However the sheriff, also taking into account the evidence of a special constable who had accompanied the sergeant, found the unsteadiness was not a factor in the decision of the officers to arrest the respondent, and that there was not enough evidence to justify the officers' conclusion that the respondent was probably guilty of a contravention of s. 5 (2), to enable them lawfully to arrest the respondent, and accordingly acquitted him. The opinion of the court was that:

...It was not and could not be in dispute that under section 5 (5) a constable may arrest a person 'apparently' committing an offence under section 5 and upon that understanding of the subsection the sheriff proceeded to consider the legality of the arrest of the respondent. After examining the authorities to which he refers in his note he decided that the question he must ask himself was this - 'Whether on their own observations the police officers were justified in concluding that the respondent was probably guilty of s. 5 (2)- being in charge of a motor vehicle when unfit to drive through drink and in arresting him without warrant'. He then proceeded to look not only at the evidence of the police sergeant, the arresting officer, but at the evidence of the special constable as well. Having done so he decided that it had not been proved that unsteadiness on the part of the respondent had been a factor in the decision to arrest him and that the only factors had been

¹²¹ *Mcleod v Shaw* 1981 S.C.C.R.54.

that there was 'some slurring in the respondent's speech which was precise and some glazing in his eyes'. He then reached his own conclusion that these two factors did not justify the belief that the respondent was probably unfit to drive through drink and the result was the respondent's acquittal.

We have no doubt that in reaching his decision to acquit the respondent the learned sheriff misdirected himself. He asked himself the wrong question and having done so made the mistake of attempting to reconcile the evidence of the two police officers present with the result that he excluded from his consideration one of the facts as they appeared to be to the arresting officer, the police sergeant—one of the several grounds upon which she formed the honest belief that the respondent was apparently committing the section 5 (2) offence. The question which the sheriff should have asked himself can, in this case, be put in this way: 'Am I satisfied that the experienced arresting officer, the police sergeant, had no reasonable grounds for her admittedly honest belief that the respondent was apparently committing the section 5 (2) offence which she had in mind?' That this was the proper question emerges from a consideration of the cases of *Wiltshire v. Barrett* [1966] 1 Q.B. 312; *Woodage v. Jones* (No. 2) [1975] R.T.R. 119; *Seaton v. Allan*, 1973 J.C. 24; and *Breen v. Pirie*, 1976 J.C. 60. It was the state of mind and knowledge of the arresting officer and of no other which is here in issue. It is not surprising, therefore, that counsel for the respondent agreed that this was so. What the sheriff should have done, accordingly, was to ask himself that question with reference only to the facts as they appeared to the arresting officer, the police sergeant—the facts upon which her admittedly honest belief was founded. Had he done so he could not have held that she had not reasonable grounds for that honest belief. We are certainly not prepared so to hold.

In the result we conclude that the sheriff erred in law in acquitting the respondent for the reason which he gives, and that the prosecutor's appeal must be allowed.

This case dealt with a particular statutory provision (s. 5 (2) of the Road Traffic Act 1972). However, its reasoning could be applied to other statutory provisions. The significant conclusion which could be drawn from the decision is that a constable may arrest someone without warrant where he has reasonable grounds for believing that that person was committing a statutory offence.¹²²

After reviewing arrest without warrant in both English law and Scottish law it is now desirable to make a brief comparison between the two.

In English law there is distinction between arrestable and non-arrestable offences, where in the former the law confers upon both the police and a

¹²² See Albert V Sheehan *supra*, n. 32 para 3-06.

private citizen powers to arrest without warrant, noting that powers conferred upon the police are wider than those which are conferred upon the private citizen. Although this law repealed most statutory powers to arrest without warrant, it preserved some statutory powers of arrest. In addition, English law gives the police the right to arrest without warrant where certain conditions exist. Anyone may arrest for a breach of the peace under this law under specific circumstances . Finally English law provides for the police power to arrest for fingerprinting.

Unlike English law, Scottish law does not make a distinction between offences, making arrest without warrant subject to the common law general principle “arrest without warrant is not justified unless necessary in the interests of the justice.” Further, when the general principle is applied, arrest without warrant is permitted to anyone whether a police officer or a private citizen.

As with English law, powers to arrest by a private citizen are limited compared to the powers of the police. Scottish law has not repealed statutory powers to arrest without warrant and there are a number of provisions conferring upon the police a power to arrest without warrant, according to the offence. Scottish Law, in respect of a breach of the peace, empowers only the police to arrest without warrant, a private citizen may only interfere to prevent a breach of the peace.

It is worth mentioning that arrest without warrant for fingerprinting in Scottish Law is covered by Section 14 of the Criminal Procedure Act 1995. Moreover, under that section the police, instead of arrest on suspicion, can detain on suspicion, but only for a limited period of six hours.

Arrest and Safeguards of liberty

Arrest and Safeguards of liberty

4

Arrest, as one of the procedures which most affect an individual's liberty, should be surrounded by legal safeguards. These safeguards are based on two important facts. First, the need to protect the position of the person under arrest who is facing the police. Second, the person under arrest is still at the stage of pre-trial procedures and thus he has the benefit of the presumption of innocence. Therefore, an arrested person should have all his rights under the law, excepting only those affected by arrest.¹ And the police in exercising their power of arrest should consider the individual's rights and should conduct themselves within the limitations of the law.

This chapter deals first with the safeguards, which are provided by laws, for an arrested person and second, it deals with his right to be silent when questioned whether by the police or by the prosecution.

Section (1) Safeguards of an arrested person

Laws regarding the safeguards of a person under arrest are to some extent similar in most countries. The safeguards of an arrested person mean the rights which are granted to him by law. This study will consider these rights throughout the laws concerned.

¹ Husni. M.N., *Sharh Qanun Al-Ijra'at Al-Jina'iyyah* Dar Al-nehdah Al-arabiah (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1988 p. 69.

Egyptian Law

Rights of a person under arrest in Egypt are stated by the Constitution of 1971 and by the Criminal Procedures Act 1950.

The most important of these rights are considered below: informing the arrestee about the nature of the offence and the reason for his arrest; listening to his statement; access to a lawyer; limitation of the arrest period.

Informing the arrested person about the offence

Arrest which is permitted by law is arrest which is executed in accordance with its provisions, and these provisions state that arrest is unlawful unless there are reasons to justify it. Informing an arrested person about the offence and the reasons why he is arrested is important as it protects the person under arrest from abuse of police power. For example, a police officer, aware of the necessity of informing the arrested person of the reason for the arrest, will not arrest that person unless he has got reasons to justify it.² In addition, informing the arrested person about the offence and the reason for arrest gives him the opportunity to defend himself and to choose the best means for his defence.³ It commonly happens that an arrested person has evidence of his innocence and, as soon as he is informed of the reason for his arrest, he can present this evidence.

Another important factor is involved in informing the arrested person about the offence and the reasons for his arrest; this relates to any confession made by him after arrest. A confession by an accused person is incompetent unless he is aware of the nature of the offence which he confesses that he has committed.⁴

² Al-Mohannadi. H., *Al-Qabdh Ala Al-Muttaham Fi Al-Qanun Al-Misri* (Arabic) (Arrest of an accused person under Egyptian law) LLM thesis the University of Cairo 1993 p. 373.

³ Ibid, p.373.

⁴ Al- Mulla. S., *E`ateraf Al-Muttaham* (Arabic) (The Accused Confession) PhD thesis, Cairo University 1969 p. 36.

The Egyptian Constitution 1971⁵ and the Criminal Procedures Act 1950⁶ both oblige the police to inform the arrested person about the offence and the reason for arrest. However, they do not specify the way in which the arrestee should be informed. The general principle is that the police officer who effects the arrest should inform the arrestee, in simple language, of the nature of the offence and the reasons which justify the arrest.⁷ A police officer is not obliged to explain the details of the offence or its circumstances.⁸

Information which should be given to the person under arrest may be in writing or oral. And the arrestee should be informed without any delay. Both the Egyptian Constitution and the 1950 Act regarding the time of informing provide that it should be 'immediately', which means without any unnecessary delay.

The right of the arrested person to be informed about the offence of which he is accused, and the reason for it, is a significant safeguard. Consequently, ignoring that right may vitiate the arrest since it constitutes a breach of an important procedure.⁹

Taking the statement of the arrested person

It is a function of the police to take the statements of suspects, witnesses and whoever may have information about crimes, in order to reach the truth. Article (29) of the Criminal Procedures Act 1950 states that judicial police officers during the investigation of crimes are entitled to listen to anyone who has information about criminal events and their perpetrators, and they are also entitled to question the accused about it.

⁵ The Egyptian Constitution, Art.71.

⁶ The Criminal Procedures Act 1950, art. 139.

⁷ Al-Mohennadi. H., *supra*, n. 2 p.377.

⁸ Abdulla. H., *Al-markaz Al-Qanuni Lil Muttaham Fi Merhalat Al-Tahqiq Al-Ibtida'iy* (Arabic) (The Legal status of The accused Person in the inquiry stage) Cairo 1989, p. 159.

⁹ See Criminal Procedure Act 1950, Art. 331.

The above powers of judicial police officers are mere investigative powers which are granted to them, before inquiry powers, to help them in their duties.¹⁰ It is obvious that a judicial police officer has discretion whether or not to take the statement of a suspect. However, in a case where the suspect is under arrest, the officer is obliged to listen and to take the suspect's statement; this becomes one of the rights of the arrested person. This is what Article (36) of the 1950 Act establishes where it states that "a judicial police officer is obliged to listen to the arrested accused and he should send him within twenty-four hours to the prosecution if the accused does not present evidence to clear himself."

The listening to an arrested accused by a judicial police officer means merely asking him about the alleged offence and taking his statement without discussing it with him or confronting him with the witnesses or other suspects or evidence which indicates his guilt.¹¹ This is the distinction between merely asking an accused about the offence generally and interrogating him. The latter is an inquiry procedure and, as a general rule, is granted only to an inquiry officer (except in specific cases where it may be exercised by a judicial police officer).¹²

The right of an arrested person to have his statement listened to forms an important tool for him with which to defend himself. And this right is connected with his right to be informed about the offence and the reasons for his arrest, where the object of the former right is to enable the person under arrest to defend himself, which cannot be achieved without the latter right.

A police officer should allow a person under arrest to say whatever he wants to say in order to express his opinion and the police officer should record

¹⁰ E.D.D.C.C. Cassation No. 213, 25 December 1982, p.1038.

¹¹ Mahdi. A., *Sharh Al-Qawa'id Al-Ammah Lil Ijra'at Al-Jina'iyah Al-Juz' Awwal* Dar Al-nahda Al-arabiah (Arabic) (Explanation of the General Principles of the Criminal Prosedure part 1) (Cairo 1995) p. 153; Srour. A. F., *Al-Ijra'at Al-Jina'iyah* Dar Al-nehdah Al-arabia (Arabic) (Criminal Procedures) 1993 p. 344.

¹² Criminal Procedures Act 1950, Art. 71/2; Mahdi supra, n. 11 p. 341.

literally his whole statement.¹³ In spite of provisions which emphasize the right of a person under arrest to have his statement listened to, in practice this right is not frequently observed.¹⁴ However, the arrested person whose right to have his statement listened to has been denied, can object, and this may vitiate the arrest.¹⁵

While a person under arrest has the right to have his statement listened to, he conversely also has the right of silence. The right of silence means that the person under arrest is free to answer police questions or to be silent, where the general principle is that nothing can oblige him to speak, as this right is related to his right to defend himself.¹⁶ A person under arrest may in some cases cling to his right of silence and, in other cases, may answer the police questions. It is up to his discretion whether it is proper to speak or to be silent.¹⁷ Since silence is one of the rights of a person under arrest, two consequences follow. First, the police have no right to oblige a person under arrest to answer their questions. Second, the silence of an accused person should not be taken as raising a presumption of guilt against him.¹⁸

Access to a lawyer

The right of a person under arrest to access to a lawyer is implied in his right to defend himself in the inquiry stage, and this is irrespective of whether he is arrested by the police or by an inquiry officer (a prosecutor or an inquiry judge), since arrest in both cases is an inquiry procedure.

¹³ Al-Halabi. M. A., *Dhamanat Al-Hurreiah Al-Shakhseyah Athnaa' Al-Tahery Wal Istedlal* (Arabic) (Personal Liberty Safeguards in Investigation 'in comparative law') 1981 University of Kuwait p. 197.

¹⁴ Mohammad. A., *Qanun Al-Ijra'at Al-Jina'iyyah Al-Juz 'Awwal* (Arabic) (Criminal Procedure part 1) Cairo 1991p. 353.

¹⁵ Obaid. R., *Qawa'id Qanun Al-Ijra'at Al-Jina'iyyah* (Arabic) (Criminal Procedure Principles) Cairo 1985 p. 460.

¹⁶ Mohammad. A., *supra*, n. 14 p. 202.

¹⁷ *Ibid.*

¹⁸ Mahdi. A., *supra*, n. 11 p. 154.

The importance of access to a lawyer arises from the gravity of procedures flowing from arrest, such as the power of a judicial police officer to take the statement of a suspect which could lead the suspect to produce incriminating evidence. Therefore, the presence of a lawyer during questioning would presumably protect the suspect from oppressive questions.

The Egyptian Constitution states that “anyone who may be arrested or detained should be immediately informed of the reason for his arrest or detention, and he has the right to contact whoever he wants to inform them about the event and to seek their assistance, in accordance with the law.”¹⁹

The Egyptian Criminal Procedures Act 1950 reflected the Constitution’s provision when it stated that “anyone who is arrested or detained pending investigation should be immediately informed of the reasons for his arrest or detention and he has the right to contact anyone who he wants to have informed about what was happened, and to have access to a lawyer.”²⁰ The same Act gives the parties the right to be accompanied by their attorneys in an inquiry.²¹

In addition, the Legal Provision Act 1983 provides that “a lawyer has the right to see judicial papers, and obtain information which is related to the action which he is involved in. All courts, police stations....should provide him with all facilities which are needed to perform his duty and enable him to see papers, obtain information and attend the inquiries with his client, in accordance with the provisions of the law; and it is incompetent to refuse his requirements without legal justification.”²²

From the above provisions one could conclude that a person under arrest whether in the hands of the police or an inquiry officer should have the right to see a lawyer. However, the Egyptian Cassation Court considers all police procedures as investigation procedures and not inquiry procedures, even if these procedures involve arrest, and so it distinguishes between the case where a

¹⁹ The Egyptian Constitution 1971, Art. 17.

²⁰ The Egyptian Criminal Procedures Act 1950, Art. 139.

²¹ Ibid, Art. 124/1.

²² The Legal Provision Act 1983, Art. 52.

person is arrested by the police and the case where he is arrested by the inquiry officer. Only where the person is arrested by the inquiry officer does the Cassation Court recognize the right of that person to have access to a lawyer. Under police arrest the Cassation Court recognizes no such right. The Cassation Court emphasises this in several decisions. One of the cases which adopts this position can be summarized as follows: the appellant was questioned by the police without being allowed to have his lawyer with him. The appellant was convicted and appealed to the Cassation Court on the ground that the questions and answers should not have been admitted in evidence since the preventing of the accused's lawyer from attending with his client vitiated the police verbal process. The Cassation Court held that preventing the lawyer of the accused from attending with him during the questioning did not vitiate the police verbal process. And it held that the objection had no legal justification.²³

This decision of the Cassation Court met with intensive criticism from Egyptian jurists who view it as a necessity that an arrested person should have the right of access to a lawyer. This right should not be restricted only to the case where the person is under the arrest of the inquiry officer. The right should also cover the case where a person is under police arrest. The jurists consider that arrest is an inquiry procedure irrespective of the authority which executes it, whether this be the police or the inquiry officer.²⁴

Limitation of the arrest period

Arrest is a temporary procedure which deprives a suspect of his freedom, and it should be terminated within a short period.

The Egyptian Criminal Procedures Act 1950 prescribes the period during which a suspected person may remain under arrest whether by the police or the prosecution. The 1950 Act provides that a judicial police officer after arresting

²³ E.D.D.C.C. Cassation No.88, 8 March 1977, p. 421.

²⁴ Abu Aa'mer. M. Z., *Al-Ijra'at Al-Jina'iyyah Criminal Procedures* Dar El matpuaat El jamieah (Arabic) (Criminal Procedure) Acadimic Printing House (Alexandria 1984) p. 102; Srou. A. F., *supra*, n. 11 p. 261

an accused person must listen to him immediately, and if the accused does not provide evidence to exculpate himself, the judicial police officer is obliged to send him within twenty four hours to the competent prosecution authority. The prosecution must interrogate the accused within twenty-four hours, then it either detains him pending investigation or releases him.²⁵ Therefore, the maximum period of arrest either for the police or the prosecution is twenty-four hours. And the person should not remain under arrest for a period exceeding forty-eight hours.

It is worth mentioning that the above period of arrest applies only where a person is arrested in accordance with the Criminal Procedures Act 1950.

In certain circumstances, a suspected person may remain under arrest for a period of time much longer than that which is stated by the 1950 Act. This is where the person is arrested in accordance with the State of Emergency Act 1958, or in accordance with the Establishment of State Security Courts Act 1980.

According to the State of Emergency Act a suspect may remain under arrest or detention for thirty days before he can complain of arrest or detention. Article (3) of the State of Emergency Act 1958, regarding persons arrested under this Act, provides that an arrested or detained person can complain thirty days following the execution of that arrest or detention. The competent court, after listening to the arrested or detained person, should make a reasoned decision regarding that complaint within fifteen days, otherwise the suspect should be released.²⁶ Some voices among Egyptian scholars criticise the continuance of the declaration of the state of emergency which they consider a black spot in the progress of democracy.²⁷

²⁵ The Criminal Procedures Act 1950, Art. 36/1.

²⁶ A state of emergency has been in force in Egypt since 1980. Article (1) states "declaration of emergency is permissible whenever public order or security on the land of the republic or any part of it face a danger, whether due to a war, a situation which threatens war, internal disturbance, general disaster or spreading of an epidemic. The decision of the declaration of state of emergency and its termination is issued by the president."

²⁷ See Taleema. M. A., *Al-Hemaya Al-Qadha'iya Lil Hurreyah Al-Shakhse'iya* (Arabic) (The Judicial Protection of Personal Liberty) PhD thesis, the University of Cairo, 1990, p. 17.

As regards the Establishment of State Security Court Act 1980, a suspect may remain under arrest for a period which cannot exceed seven days. We have mentioned before that Article (35/2) of the Criminal Procedures Act 1950 grants a judicial police officer powers of carrying out protective procedures against a person whom he suspects on sufficient evidence to have committed a felony or the misdemeanours of theft, swindling, serious assault or violent resistance against the police, and to seek a warrant from the prosecution to arrest him.

Article (7) ²⁸ of the Establishment of State Security Courts Act grants a judicial police officer similar powers on the same grounds but, regarding other offences. ²⁹ These powers are even stronger, entitling the judicial police officer to carry out protective procedures against the suspect and to seek a warrant to arrest him within twenty-four hours. The prosecution, after taking into consideration the interests of inquiry and protection of society, may then issue a warrant to the judicial police officer to arrest that person for a period not exceeding seven days. The judicial police officer must question the suspect and send him to the prosecution within the stated period, and the prosecution must interrogate the suspect within seventy-two hours and then decide whether to release him or detain him pending investigation.

²⁸ Amended by the 1992 Act No. 79.

²⁹ Terrorism offences.

The UAE Law

The UAE law regarding the rights of an arrested person is to a degree similar to Egyptian law. However, it does not provide all the rights of arrested persons which are contained in Egyptian law, as shown below:

Informing an arrested person about the offence

The UAE Penal Procedures Act 1992 does not contain a provision giving an arrested person the right to be informed about the offence of which he is accused and the reasons for that accusation. The 1992 Act does, however, oblige the police to take the arrested person's statement (discussed below).

In my view, the reason why the 1992 Act does not confer on the arrested person the right to be informed about the offence and the reason for his arrest could be that that right is implied, since the Act obliges the police to take the statement of the arrested person within forty-eight hours. It is, in my opinion, illogical to take a statement from a person and to expect his answer without informing him of the reason for it. Nevertheless, the non-existence of that safeguard in the Act makes the right of the arrested person to be informed about the offence and the reason for arrest a matter of police discretion, and leaves it to the police to decide whether to inform that person, and the timing of that information. Arrest is still lawful even if the police decide not to inform that person. Therefore, the safeguard of informing the arrested person about the nature of the offence and the reason of arrest should be provided by the law to enable the arrested person to produce his defence and to choose the best method for that defence and to avoid the likelihood of abuse of police power, in particular to prevent them from exercising the power of arrest whenever they like, by imposing upon them the need to present reasons for arrest before executing it.

Taking the statement of an arrested person

The UAE Penal Procedures Act 1992 gives the police the right to question a person under arrest, which is stated by Article (40) when it provides that “a judicial police officer during the collection of evidence, may listen to anyone who may have information about criminal events and their perpetrators, and the judicial police officer may question an accused person about that”.

This right of a judicial police officer is given to him by the law at the collection of evidence stage, namely, the stage of investigation where he has discretion to exercise that right since he has not become involved in the inquiry stage by exercising one of the inquiry procedures such as arrest. Therefore, when a judicial police officer exercises his power to arrest a person he is then obliged to listen to that person and to take his statement. Article (47) of the 1992 Act states that “a judicial police officer must listen to an accused person immediately after arresting him, and if the accused does not demonstrate his innocence the judicial police officer must send him within forty-eight hours to the competent prosecution. The prosecution must interrogate him within twenty-four hours and then it should release or arrest him”. This article is dealing with arrest without warrant by a judicial police officer, and although it grants the police forty-eight hours to keep an accused person under arrest, it obliges the police to listen to the accused immediately without any unnecessary delay.

Regarding the prosecution, Article (47) does not oblige them to interrogate the arrested accused immediately. However, that obligation is found in Article (104) of the same Act. This article deals with arrest under warrant and obliges the prosecution to interrogate the arrested person immediately and, if that is impracticable, the arrested person may be detained for a period not exceeding twenty-four hours until his interrogation.³⁰

In fact, I find no reason as to why the 1992 Act distinguishes between the situation where an accused person is arrested under warrant and where he is

³⁰ The UAE Penal Procedures Act 1992, Art. 104

arrested without warrant. In the first situation, the Act requires the prosecution to interrogate him immediately, while in the second situation it does not.

The UAE Penal Procedures Act 1992 contains no provisions stating the right of an arrested person to be silent. In practice, however, this right of an arrested person is secured as he is under no compulsion to speak. And his silence during the inquiry procedures cannot be counted against him, on the basis of the presumption of innocence, which makes the onus of proving the accused's guilt lie with the prosecution.

Access to a lawyer

The UAE Penal Procedures Act 1992 provides "the accused's lawyer must be enabled to attend inquiries with his client and he must be allowed to see the papers connected with of the inquiries unless the competent prosecutor refuses that on the ground of the inquiry's interests".³¹

This is the only provision under the 1992 Act which deals with the accused's right to see a lawyer during the initial inquiries, namely, the prosecution inquiries. Unlike Egyptian Law which states the right of an arrested person to see a lawyer after he has been arrested, the UAE 1992 Act restricts the arrested person's right to see a lawyer only where that person is under prosecution arrest. Where he is under police arrest he has no right to see a lawyer.³² However, a judicial police officer arresting him may allow him to do so since this is up to the discretion of the judicial officer.³³ Although arrest is an inquiry procedure irrespective of the authority who executes it, the UAE Penal Procedures Law considers all police powers including arrest mere investigative procedures, not inquiry procedures. This could explain why the 1992 Act does

³¹ Ibid, Art. 100.

³² Husain. J., *Al Wajeez Fi Sharh Qamun Al-Ijra'at Al-Jaza'iyah Li Dowlat Al-Imarat Al-Arabiah Al-Mutahidah Al Juz'Al-awwal* Mattabie Al-baian Al-tijariah (Arabic) (Explanation of the UAE Penal Prosedures Law) part 1 Al-bayan Press (Dubai 1994) p. 345.

³³ Ibid.

not state the right of an arrested person under police arrest to have access to a lawyer.³⁴

In my view, access to a lawyer is a substantial safeguard to an arrested person and that person should be granted this right regardless of whether he is under police arrest or prosecution arrest. In addition, the need of a person under police arrest for access to a lawyer could be more pressing than the need under prosecution arrest. This is because the prosecution as a judicial authority, provides more safeguards for a person under arrest than does the police, as an authority whose main duty is to prevent crimes and arrest criminals.

Limitation of the arrest period

The period of arrest should be limited in order to reduce the suffering of a person whose freedom is restricted by arrest. The UAE Penal Procedures Act 1992 limits the period within which the police or the prosecution can keep a person arrested. It states “a judicial police officer must listen to an accused person immediately after arresting him, and if the accused does not demonstrate his innocence the judicial police officer must send him within forty-eight hours to the competent prosecution. The prosecution must interrogate him within twenty-four hours, then it should release or arrest him.”³⁵ A judicial police officer acting in accordance with the above provision cannot keep a person under arrest for a period exceeding forty-eight hours. The bill of the 1992 Act³⁶ equalised the maximum period during which a person might stay under arrest, by police or the prosecution, at twenty-four hours. In the case where a judicial police officer keeps a person under arrest for more than the stated period he is committing a false imprisonment in accordance with Article (240) of the UAE Penal Law Act 1987, which states “any public servant or any person authorised by a public servant who arrests or detains a person other than as in cases stated by the law is

³⁴ Ibid.

³⁵ The UAE Penal Procedures Act 1992, Art. 47

³⁶ The Bill of the UAE Penal Procedures Act 1992, Art. 47.

liable to a detention punishment". This, however, does not elide the fact of his responsibility for damage. When the prosecution receives a person from the police whom they have had arrested for a period exceeding the permitted period they should release him immediately since the arrest is unlawful. On the other hand, if the arrest of that person is within the permitted period they must then interrogate him within twenty-four hours, and then release or detain him pending investigation.

English law

The arrested person has a variety of rights under English Law in order to protect him from the abuse of police power. The most important are treated below, and include: informing the person of the fact of arrest; permitting him access to a lawyer; allowing him to communicate with the outside world; taking him to a police station; the existence of a custody officer.

Informing a person under arrest of the fact of arrest and its reasons

At common law, the arrest of a person is unlawful unless the arrestee is informed of the fact that he is under arrest.³⁷ In some circumstances, however, this rule becomes impossible to apply: for example, where the person is deaf, or cannot understand English, or otherwise is incapable of understanding, e.g. is drunk.³⁸

Section 28 (1)(2) of the Police and Criminal Evidence Act 1984 reproduces the common law rule when it states that arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest, even if the fact of arrest is obvious. Section 28 (5) provides an exception where it was not reasonably practicable for the arrested person to be informed (that he is under arrest) by reason of his having escaped from arrest before the information could be given.

³⁷ See, *Alderson v Booth* [1969] 2 All ER 271.

³⁸ See, *Wheatley v Lodge* [1971] 1 All ER 173.

In addition to his right to be informed of the fact of arrest the person has the right to be told the reason for that arrest. This right is safeguarded by both common law and under statute and failure to accord that right may render the arrest unlawful. That was what was decided in *Christie v Leachinsky*.³⁹ Viscount Simon stated in this case that:

- 1- If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
- 2- If the citizen is not so informed, but nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
- 3- The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.
- 4- The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.
- 5- The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away.

Section 28 (3)(4) of the PACE provides that arrest is unlawful unless the person arrested is informed of the grounds for the arrest at the time of, or as soon as is practicable after, the arrest, even if the grounds for the arrest are obvious. The above provision is subject to the same exceptions as are provided by section 28(5).

The time of informing a person under arrest of the fact of arrest and the reason for it (stated by s. 28 to be “at the time, or as soon as practicable”) needs further clarification since the elements which constitute arrest could be various.

³⁹ *Christie v Leachinsky* [1947] 1 All ER 570.

In *Nicholas v Parsonage*⁴⁰ Glidewell LJ in considering the phrase ‘at the time of arrest’ said:

It does not in my view mean simply the precise moment at which the constable lays his hands on the defendant and says ‘I am arresting you’; it comprehends a short but reasonable period of time around the moment of arrest, both before and, as the statute itself specifically says, after.

The Police and Criminal Evidence Act 1984 in section 30 (7) obliges a constable who effects an arrest at a place other than a police station to release the arrested person where the reason for the arrest has ceased. It states that “A person arrested by a constable at a place other than a police station shall be released if a constable is satisfied, before the person arrested reaches a police station, that there are no grounds for keeping him under arrest.” From this provision one may infer that the main purpose of informing a person under arrest of the grounds for his arrest is to enable the arrested person to defend himself. For example, suppose a constable is not satisfied that the name which has been provided by a person is his real name and he is consequently arrested on that ground.⁴¹ If before reaching a police station, the constable is satisfied that the name given is the real name, the person therefore must be released.

Access to a lawyer

Until 1986 when the Police and Criminal Evidence Act 1984 came into force the right of an arrested person to have access to a lawyer was governed by the Judges’ Rules which recognised that; ‘Every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor.’ The current position of the right of a person under arrest to have access to a solicitor is covered by section 58 of the PACE which provides that ‘a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.’⁴² In order

⁴⁰ *Nicholas v Parsonage* 1987 Crim. L.R. 474 D.C.

⁴¹ The Police and Criminal Evidence Act 1984 s. 25 (3)(b).

⁴² The PACE Act s. 58(1).

to make an arrested person aware of his right to have access to a solicitor and to consult with him in private a custody officer must inform him clearly of that right.⁴³

The request of an arrested person to have access to a solicitor must be complied with as soon as practicable. The PACE regarding this matter distinguishes between serious arrestable offences and offences of terrorism on the one hand and lesser offences on the other. In lesser offences the police have no right to delay the right of an arrested person to have access to a solicitor. In serious arrestable offences and offences involving terrorism the police can delay such right of an arrestee. In regard to serious arrestable offences an officer of the rank of at least superintendent may authorise delay where he has reasonable grounds for believing that the exercise of the right (access to a solicitor):⁴⁴

- a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
- b) will lead to alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- c) will hinder the recovery of any property obtained as a result of such an offence.

An officer may also authorise delay where the serious arrestable offence is a drug trafficking offence [or an offence to which Part VI of the Criminal Justice Act 1988 applies] and the officer has reasonable grounds for believing-

- a) where the offence is a drug trafficking offence, that the detained person has benefited from drug trafficking and that the recovery of the value of that person's proceeds of drug trafficking will be hindered by the exercise of the right of access to a solicitor; and
- b) where the offence is one to which Part VI of the Criminal Justice Act 1988 applies, that the detained person has benefited from the offence and that the

⁴³ The Code of Practice C, para, 6.1 provides that 'subject to the provisions in Annex B all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with a solicitor, and that independent legal advice is available free of charge from the duty solicitor'.

⁴⁴ The PACE s. 58(8).

recovery of the value of the property obtained by the person from or in connection with the offence or of the pecuniary advantage derived by him from or in connection with it will be hindered by the exercise of right of access to a solicitor.⁴⁵

With regard to offences involving terrorism the police can delay the right of a person arrested in connection with such offence on the same conditions stated above where exercising of such right: ⁴⁶

a) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or

b) by alerting any person, will make it more difficult-

(1) to prevent an act of terrorism; or

(2) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism.

The effect of a breach of section 58 (8) on the subsequent proceedings has been dealt with by several court decisions. One of those decisions which makes such a breach of vital importance to the subsequent proceedings is *R v Samuel*.⁴⁷ In this case, the suspect was being interviewed in connection with robbery and burglary. During his interview he asked for a solicitor. His request was refused on the ground that the offences were serious and that there was a risk of accomplices being inadvertently alerted. Subsequently he confessed. At his trial, it was argued on his behalf that the record of the interview in which he confessed should be excluded. The trial judge admitted the interview and the suspect was convicted and given a ten-year prison sentence. The Court of Appeal quashed the conviction. It held that the right of access to a solicitor was “a fundamental right of a citizen” and if a police officer sought to justify refusal of the right he had to do so by reference to the specific circumstances of the case. It was not enough to believe that giving access to a solicitor might lead to alerting of other suspects; he had to believe that it probably would and that the solicitor either would

⁴⁵ Ibid, s.58(8A)

⁴⁶ Ibid, s. 58(13).

⁴⁷ *R v Samuel* [1988] 2 All ER 153. See in contrast, *R v Dunford* 1991 C.L.R 370.

commit the criminal offence of alerting other suspects or would be hoodwinked into doing so inadvertently or unwittingly.

An arrested person whose right of access to a solicitor has been delayed must be told the reason for it, and this must be recorded on the custody sheet.⁴⁸ The delay of the right of the arrested person to consult with a solicitor must be ended when the reason for it ceases to exist, and that delay is limited to a period of 36 hours.⁴⁹ The reasons which may allow the police to delay the right of a person arrested to have access to a solicitor, are limited to the reasons which are stated above. Annex B of the Code of Practice provides “Access to a solicitor may not be delayed on the ground that he might advise the person not to answer any questions or that the solicitor was initially asked to attend at the police station by someone else, provided that the person himself wishes to see the solicitor. In the latter case the detained person must be told that the solicitor has come to the police station at another person’s request, and must be asked to sign the custody record to signify whether or not he wishes to see the solicitor.”⁵⁰

During the period between an arrested person’s request to see a solicitor and the arrival of the solicitor, the police cannot interview that person. This rule is provided by the Code of Practice, where it states that “A person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it.” This rule is subject to four exceptions:⁵¹

1) if the arrested person is suspected of a serious arrestable offence or an offence of terrorism as explained above.

2) if an officer of the rank of superintendent or above has reasonable grounds for believing that:

a- delay will involve an immediate risk of harm to persons or serious loss of, or damage to, property; or

⁴⁸ The PACE s. 58(9)(a)(b).

⁴⁹ The Code of Practice C, Annex B-4, in respect to offences of terrorism, delay of access to a solicitor may be extended to a period of 48 hours, the Code of Practice Annex B-9.

⁵⁰ Ibid, Annex B-3.

⁵¹ The Code of Practice C, para, 6.6.

b- where a solicitor, including a duty solicitor, has been contacted and has agreed to attend, awaiting his arrival would cause unreasonable delay to the process of investigation; or

3) The solicitor nominated by the person, or selected by him from a list:

a- cannot be contacted; or

b- has previously indicated that he does not wish to be contacted; or

c- having been contacted, has declined to attend;

and the person has been advised of the Duty Solicitor Scheme (where one is in operation) but has declined to ask for the duty solicitor, or the duty solicitor is unavailable. (In these circumstances the interview may be started or continued without further delay, provided that an officer of the rank of Inspector or above has given agreement for the interview to proceed).

4) The person who wanted legal advice changes his mind. In these circumstances the interview may be started or continued without further delay, provided that the person has given his agreement in writing or on tape to being interviewed without receiving legal advice and that an officer of the rank of Inspector or above has given agreement for the interview to proceed in those circumstances.

In order to prevent the police from attempting to deprive an arrested person of his right to have access to a solicitor, they are obliged to record any request of that person to see a solicitor and any delay or refusal of that request on the custody sheet.⁵²

As soon as he arrives at the police station a solicitor must be entitled to communicate with his client in private.⁵³ He has the right to be present with his client during the police interview, and he is entitled to object to improper questions and to give his client any advice where it is necessary. The police cannot prevent him from doing so unless his conduct, as the Code provides, "... is such that the investigation officer is unable properly to put questions to the suspect"⁵⁴ when the officer may require the solicitor to leave the interview. The

⁵² The PACE s. 58 (2) and (9).

⁵³ Ibid, s. 58 (1).

⁵⁴ The Code of Practice C, paras, 6.8, 6.9.

Notes for Guidance on the Code clarify matters by providing that "...The solicitor's only role in the police station is to protect and advance the legal rights of his client. On occasions this may require the solicitor to give advice which has the effect of his client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification or to challenge an improper question to his client or the manner in which it is put, or to advise his client not to reply to a particular question, or if he wishes to give his client further legal advice. Paragraph 6.9 will only apply if the solicitor's approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect or his response being recorded. Examples of unacceptable conduct include answering questions on a suspect's behalf or providing written replies for him to quote".⁵⁵

The right to communicate with the outside world

A person arrested has the right to have somebody informed about his arrest and the place to which he is being taken. This right of an arrestee was formerly governed by section 62 of the Criminal Law Act 1967 which stated 'Where any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him, without delay or, where some delay is necessary in the interests of investigation or prevention of crime or the apprehension of the offenders, with no more delay than is necessary'.

The Police and Criminal Evidence Act 1984 provides the same right, with minor modification regarding persons who may be informed and the grounds which justify delay in informing. Section 56 of the 1984 Act states 'Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so request, to have one friend or relative or other person who is known to him or who is likely to take an interest in his

⁵⁵ Notes for Guidance on The Code of Practice C (Note 6D).

welfare told, as soon as practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there.’

The right of an arrested person to have someone informed of his arrest, is similar to his right to have access to a solicitor, as far as grounds for delay are concerned. Where a person is arrested for a serious arrestable offence or an offence involving terrorism, an officer of at least the rank of superintendent may authorise a delay on the same grounds stated above regarding delaying access to a solicitor. Where delay is authorised, the arrested person must be told the grounds for it and the police must record this on his custody sheet.⁵⁶

An arrested person has the right to have somebody informed of his whereabouts whenever he is transferred from one place to another.⁵⁷ Where an arrested person exercises his right to inform another person about the fact of arrest, his letter may be read and his telephone call may be listened to by the police. This is provided by the Code of Practice, which states ‘Before any letter or message is sent, or telephone call made, the person shall be informed that what he says in any letter, call or message (other than in the case of communication to a solicitor) may be read or listened to as appropriate and may be given in evidence. A telephone call may be terminated if it is being abused. The costs can be at public expense at the discretion of the custody officer.’⁵⁸

The right to be taken to a designated police station

Where a person is arrested by a constable at any place other than a police station or taken into custody by a constable after being arrested for an offence by a person other than a constable, he must be taken to a police station as soon as practicable.⁵⁹ The police station to which a person under arrest must be taken should be one designated by the chief officer of police for the area as to be used for detaining persons arrested and for which one or more custody officers will be

⁵⁶ The PACE s. 56(6).

⁵⁷ *Ibid*, s. 56(8).

⁵⁸ The Code of Practice C, para 5.7.

⁵⁹ The PACE s. 30(1)(a)(b).

appointed.⁶⁰ However, where the arresting constable is working in a locality covered by a non-designated police station, or where he belongs to a body of constables maintained by an authority other than a police authority, he may take the arrested person to any police station unless it appears to the constable that it may be necessary to keep the arrested person in police detention for more than six hours.⁶¹

In addition, in certain circumstances, any constable may take an arrested person to any police station. These circumstances are present where the constable has arrested the person, or taken the person into custody from a person other than a constable, without assistance from any other constable and no other constable is available to assist, and it appears that it will not be possible to take the arrested person to a designated police station without the arrested person injuring himself or herself, the constable or some other persons.⁶²

If an arrested person is taken to a non-designated police station he should not be held there for more than six hours after his arrest, and he should be taken to a designated police station unless he is sooner released.⁶³ If it appears to the constable by whom a person has been arrested at a place other than a police station, and before arriving at a police station, that the grounds upon which the arrest was made no longer exist, the constable should release that person.⁶⁴

A constable may delay in taking an arrested person to a police station as soon as practicable if:

- a) it is reasonable to carry out certain investigations immediately; and
- b) the presence of the arrested person is necessary in order to carry out these investigations.

⁶⁰ Ibid, s. 35.

⁶¹ Ibid, s. 30(3)(4).

⁶² Ibid, s. 30(5).

⁶³ Ibid, s. 30(6).

⁶⁴ Ibid, s. 30(7).

Where such delay occurs the reason for it must be recorded on first arrival at a police station.⁶⁵ This provision seems to be driven by a common law principle. In *Dallison v Caffery*⁶⁶ it was held that a constable had acted reasonably in taking the arrestee to a place where he claimed to have been working at the time of the offence. Lord Denning MR ruled that:

When a constable has taken into custody a person reasonably suspected of felony he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says that he was working, for there he may find persons to confirm or refute his alibi.

The requirement in section 30(1) to take an arrested person to a police station could be inappropriate in respect of the following powers of arrest:

- a) arrest and detention of a would-be immigrant who is refused leave to enter and who may be detained on board the ship or aircraft or elsewhere (paras 16(3) and 18(1) of Sch 2, of the Immigration Act 1971).⁶⁷
- b) Persons arrested for being drunk and disorderly or drunk and incapable who may under s 34(1) of the Criminal Justice Act 1972 be taken to a detoxification centre, where such centres exist.⁶⁸
- c) Persons arrested and detained under s 15(6) or (9) of the Prevention of Terrorism (Temporary Provisions) Act 1989 who may be detained on board the ship or aircraft which brought them, if they are excluded persons, or at such place as the Secretary of State may direct.⁶⁹

⁶⁵ Ibid, s. 30(10).

⁶⁶ *Dallison v Caffer* [1965] 1 QB 348, CA.

⁶⁷ Ibid, s. 30(12)(a).

⁶⁸ Ibid, s. 30(12)(b).

⁶⁹ Ibid, s. 30(12)(c).

Existence of a custody officer

One of the most effective protections created by the Police and Criminal Evidence Act 1984 is the existence of the custody officer and his duty to secure the safeguards of a person held in custody in the police station. Section 36 (1) of the 1984 Act provides that there has to be a custody officer on duty in each police station and he should be at least of the rank of sergeant. The duty of the custody officer at a police station, as stated in section 39 (1), is to ensure 'that all persons in police detention at that station are treated in accordance with this Act and any code of practice issued under it and relating to the treatment of persons in police detention; and that all matters relating to such persons which are required by this Act or by such code of practice to be recorded are recorded in the custody records relating to such persons.' The Code of Practice provides that 'A separate custody record must be opened as soon as practicable for each person who is brought to a police station under arrest or is arrested at the police station having attended there voluntarily. All information which has to be recorded under this code must be recorded, as soon as practicable, in the custody record unless otherwise specified.'⁷⁰

Undoubtedly, the existence of the custody officer at a police station and his duty to maintain a custody record, form a fundamental safeguard for a person arrested and held in custody. However, this safeguard would be more effective if the custody officer was independent of the investigating police force. Whatever the authority of the custody officer which is granted by the Act to exercise his duty as it should be, he remains a member of the same police department as the investigating officers and one way or another he may be influenced by his colleagues and superior officers.

⁷⁰ The Code of Practice C, para 2.1.

Scottish law

The rights of a person under arrest in Scottish Law are in general similar to his rights in English Law. Nevertheless, there are some differences regarding the details of each right as will be seen below. The most important rights of an arrested person in the law of criminal procedure in Scotland are: to be informed of the fact of arrest and the reasons for the arrest; to have somebody informed of the arrest; to have access to a solicitor; to be brought to a court as soon as possible.

Informing a person arrested of the fact of arrest

A person under arrest has the right to be informed immediately of the fact of arrest and the general nature of the offence for which the arrest has been made. The method of informing a person that he is under arrest and the words which may carry that meaning were dealt with in *Forbes v H.M. Advocate*.⁷¹ In this case the appellant was convicted on indictment on charges of conspiracy and contravention of section 10 (1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984. Section 12 (1) of the Act provides that a constable may arrest without warrant a person he has reasonable grounds for suspecting (a) to be guilty of an offence under section 10, or (b) to be a person concerned in acts of terrorism. Evidence against him was based on statements given by him while he had been kept in custody under section 12 (1) of the Act. In his trial his counsel objected to the admissibility of these statements. One of the grounds which he advanced was that the appellant had not been told in appropriate terms, when he was being taken into custody or at any time thereafter, that he had been arrested. He was told only that he was being detained under section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1984. The Lord Justice-General after referring to *Swankie v Milne* stated that:

... it does not follow that the police officer who effects the arrest must in every case use the word 'arrest' when he explains to the person what is

⁷¹ *Forbes v H.M. Advocate* 1990 S.C.C.R. 69.

happening when he is being taken into custody. It is desirable that he should do so, because it is necessary that it should be made clear to the person concerned that he is under legal compulsion and that his freedom of action is being curtailed. The clearer and more simple the words used in this regard the better, and the word 'arrest' satisfies this test since it is a word which has a clear meaning which is widely known and well understood. On the other hand any form of words will suffice to inform the person that he is being arrested if they bring to his notice the fact that he is under compulsion and the person thereafter submits to that compulsion...In the present case, although the appellant was told that he was being detained, he was taken from his house at an early hour to the police office in handcuffs. On his arrival there he was invited to sign the custody record which stated *inter alia* that he had been made aware of the reason for his arrest. Leaving aside for the moment the question whether that reason had been made known to him, the use of the word 'arrest' on this form together with the manner which he was taken into custody would, in our opinion, have left no reasonable doubt in his mind that he was under legal compulsion and that he was being detained in consequence of an arrest.

It is worth mentioning that the right of an arrested person to be informed of the fact of arrest exists only under the common law: there is no statutory provision which provides the right. In contrast, section 2 of the Criminal Justice (Scotland) Act 1980, now section 14 of the Criminal Procedure Act 1995, provides such a right to a detainee. The reason for this seems to be that, prior to the Criminal Justice (Scotland) Act 1980, the police had no power to detain any person against his will unless they arrested him. When the Criminal Justice (Scotland) Act 1980 came into force the police were granted a power to detain persons short of arrest and were statutorily obliged to inform a person of the fact of his detention.

After a person is informed that he is under arrest he should be told the reason for his arrest. It is a matter of importance to inform an arrested person of the reason for his arrest, in order to give him an opportunity to challenge the reason and to provide his explanation of events.

The right of a person under arrest to be informed of the reason why he is arrested, like his right to be informed of the fact of arrest, is a common law right, not a statutory one. In *Forbes v H.M. Advocate* above, the Lord Justice General, in regard to informing a person under arrest of the reason for his arrest, describes

the ways in which the police may inform an arrested person of reason for the arrest. His view is:

...it is important to bear in mind the nature and the circumstances of the power of arrest which is being exercised. Where the arrest is one which proceeds upon a warrant of arrest the police officer who executes it should state the substance of the warrant: Macdonald on the Criminal Law of Scotland (5th edn), p. 199. As Hume on Crimes, vol 2. P.79 puts it, 'the officer, when proceeding to arrest, should briefly acquaint the party with the substance of his warrant'. Where, as in this case, the arrest is without warrant the requirements of the law are in effect the same. The person must be told immediately upon his arrest of the reason why he is being arrested. Where the power of arrest is being exercised in consequence of a statutory power of arrest because the police officer has reasonable grounds for suspecting that the person has been guilty of a specific offence such as that referred to in section 12 (1)(a) of the 1984 Act, the person arrested must be told of the general nature of the offence of which he is suspected.

Informing a third party

An arrested person is entitled to have a third party informed without any delay of the fact of arrest and of the place where he is being taken to. The third party may be any person reasonably named by the arrestee and delay is only justified by the necessity of securing the investigation or the prevention of crime or the apprehension of offenders.⁷² A person under police custody must be told of the above right immediately and when he exercises his right and asks the police to inform somebody of the fact that he has been arrested, the police are obliged to record the time of the request and the time at which it is complied with.⁷³

Unlike the law in England which gives an arrested person himself the right to make a telephone call, the law in Scotland does not give such a right to a person under arrest. All calls he may require will be made on his behalf by the police.⁷⁴

⁷² The Criminal Procedure (Scotland) Act 1995, s. 15 (1)(a); Renton and Brown *Criminal Procedure according to the law of Scotland* (6th edn) para 7-17; Albert V Sheehan *Scottish Criminal 'Law and Practice Series'* (Butterworths 1990) para 3.16.

⁷³ The 1995 Act, ss. 2, 3; Renton and Prown *supra*, n. 72 para 7-17.

⁷⁴ Albert V Sheehan *supra*, n. 72 para 3.16.

Informing a solicitor

A person under arrest is entitled to have a solicitor informed of the fact of his arrest and then to have a consultation in private with the solicitor and to be told of that right.⁷⁵ A person who does not have his own solicitor may see the duty solicitor under the legal aid scheme. It is worth noting that in Scotland a person under arrest has only the right to have a solicitor informed of the fact of arrest, not to have an interview with a solicitor. It is for the solicitor to decide whether or not to see his client.⁷⁶ Accordingly, the duty of the police is only to inform this solicitor. This situation is different from the situation in England where a person under arrest may consult with his solicitor in private if he so requires, and the police cannot interview him until his solicitor attends the interview (subject to some exceptions, see above).

Nothing in the Criminal Procedure (Scotland) Act ensures the right of a person under arrest to have access to a solicitor immediately. The person is entitled only to have access to a solicitor before appearing in court. Failure to enable an arrested person to have access to a solicitor does not necessarily vitiate the subsequent proceedings.⁷⁷

To be brought to a court as soon as possible

An arrested person must be brought before a court as soon as possible and without any unnecessary delay.⁷⁸ The object of this right seems to be to limit the period of time which a person may remain under arrest in the hands of the police, and thus impose upon his liberty.

Section 135(3) of the 1995 Act provides that a person arrested under a warrant or by virtue of powers under any enactment or rule of law, shall wherever practicable be brought before a competent court not later than the first

⁷⁵ The Criminal Procedure (Scotland) Act 1995, s. 17 (1)(a)(b), (2).

⁷⁶ *Albert V Sheehan* supra, n. 72 para 3.16.

⁷⁷ *Renton and Brown* supra, n. 72 para 7-17.

⁷⁸ *Ibid*, para 7-15.

day after being taken into custody, such day not being a Saturday, a Sunday or a court holiday”.

It appears from that section that the period which a person may remain under arrest in the hands of the police could reach four days. For example, if a person was arrested in the early hours of Thursday morning and there were a court holiday on Friday, the first work day would be Monday.

After the expiry of the said period an arrested person must be brought before the competent court without any delay (with the said exceptions). Failure to comply, however, does not vitiate any subsequent prosecution, but could give rise to an action of damages.⁷⁹ In *Robertson v MacDonald*⁸⁰ the appellant was arrested on 24th October 1991 in Glasgow on a petition warrant issued by the sheriff at Wick. He was not brought to court until he appeared in the sheriff summary court at Wick on 28th October 1991. He subsequently took a plea to the competency of the proceedings against him. This plea was repelled, and the appellant appealed to the High Court. The High Court held that “even if there was irregularity because of the failure to bring the appellant before a court timeously, that did not in any way vitiate the subsequent proceedings”.

A person arrested in connection with an offence of terrorism may be kept in custody up to forty-eight hours. This period may be extended by permission of the Secretary of State.⁸¹

⁷⁹ Albert V Sheehan *supra*, n. 72 p. 66.

⁸⁰ *Robertson v MacDonald* 1992 S.C.C.R. 916.

⁸¹ Renton and Brown *supra*, n. 72 para 7-16; Alastair N. Brown *Criminal Evidence and Procedure: An Introduction* (T&T Edinburgh 1996) p. 28.

Section (2) Right to silence

The right to silence is provided in most of the world's criminal laws and it constitutes a substantial safeguard for an accused person being submitted to questioning. It is derived from a well known principle, namely, the presumption of innocence, which presumes that an accused person is under no obligation to prove his innocence, and that the burden of proof rests upon the prosecution. Therefore "the right of silence is seen as one of the legal shields which the defence will employ in preventing rebuttal of the presumption of innocence".⁸²

In spite of that, the right of silence is not absolute, since there are some laws which contain exceptions to it, and furthermore an adverse inference may be drawn from the silence of an accused in particular cases.

Egyptian Law and the UAE Law

The Egyptian Criminal Procedure Act 1950 contains no provisions dealing with the right of an accused to be silent when questioned either by the police or by the prosecution. In practice, however, the right to silence is admitted by both the Egyptian jurists and judiciary.

Under Egyptian law a person who is under arrest has the right to have his statement listened to first by the police,⁸³ and second by the prosecutor, who should interrogate the accused before deciding whether to release him or to continue keeping him under arrest.⁸⁴ Therefore the interviewing of the accused, whether by the police or by the prosecution, is among the of rights an arrested

⁸² David Dixon *Common Sense, Legal Advice and the right of Silence* [1991] Public Law 233.

⁸³ The Egyptian Criminal procedure Act 1950, Art. 36.

⁸⁴ *Ibid*, 36/1.

person and thus he can exercise such a right and answer the questions or refuse to exercise his right and simply keep silence.⁸⁵

In addition an accused person has the right to defend himself in any way he considers to be proper. For example, he can choose to keep silent and neither the court nor the prosecution can in any way comment on that silence, since that may be considered as a violation of the right of defence. Moreover, the principle of presumption of innocence presumes that the burden of proof rests on the prosecution and the accused is under no obligation to prove his innocence.

In one of its decisions the Egyptian Cassation Court held that an accused person can refuse to answer or stop answering the police questions, and that this could not be considered as an indication of his guilt. If indeed he speaks, it is to defend himself, and it is for him alone to choose the proper time and way whereby he presents that defence.⁸⁶

Similar to the situation under Egyptian law, the UAE Penal Procedure Act 1992 is devoid of any provision dealing with the right of silence. However, the principles which induced the Egyptian jurists and judiciary to presume that the right of silence is guaranteed for an accused person exist under UAE law. These principles are that an accused person has the right to have his statement heard⁸⁷ and the presumption of innocence presumes that the onus of proving the accused's guilt lies with the prosecution, and the accused is under no compulsion to answer questions by the police or prosecution.

English Law

Prior to the passing of the Criminal Justice and Public Order Act 1994 the well-established common law doctrine was that the person being interviewed by the

⁸⁵ Srouf. A. F., *Al-Shar'iyah Al-Dostor'iyah Wa Huquq Al-Insan Fi Al-Ijra'at Al-Jina'iyah* Dar Al-nehdah Al-arabiah (Arabic) (Constitutional Legitimacy and Human Rights under the Criminal Procedure) Cairo 1993, p. 195.

⁸⁶ E.D.D.C.C. Cassation No. 11, 17 May 1960, p. 467.

⁸⁷ The UAE Penal Procedure Act 1992, Art. 104.

police had the right to be silent. This silence could not be subject to any comment by the prosecution and the judge could not suggest to the jury that silence may be considered as evidence of guilt. In *R v Gilbert*⁸⁸ the Court of Appeal held that the trial judge was wrong to invite a jury to draw adverse inferences against an accused who, despite being interviewed by the police and making a statement, failed to mention that he had acted in self-defence until trial. The appellant and his victim had worked together on a building site. The victim owed the appellant money. One day the appellant asked the victim about his money, but the victim struck him with a trowel, or so he averred, and the appellant grabbed a knife from his tool bag and pushed it into the victim. The appellant made a statement to the police under caution about his relationship with his victim but remained silent when the police asked him about the incident leading to the victim's death. At his trial he said for the first time that he had done so in self-defence and under provocation.

In spite of the above the court, however, can allow the trial judge to direct the jury that silence could be taken as evidence of guilt in a particular situation.⁸⁹ This is where both the suspect and the accuser are "on even terms", for example, where the accuser is an ordinary person not a police officer or any other person in authority or charged with the investigation of an offence. In *Parkes v R*⁹⁰ the accuser was the victim's mother and the accusation was not made in the presence of the police or any person in authority. At the trial the victim's mother gave evidence that she had found her daughter bleeding from stab wounds, and as a result of what her daughter told her, she, the mother, asked the appellant more than once why he had stabbed her daughter. The appellant had made no reply. The trial judge directed the jury that the appellant's silence in the face of the

⁸⁸ *R v Gilbert* [1977] 66 Cr App Rep 273.

⁸⁹ Zander M., *Cases and Materials on the English Legal System* (7th edn Butterworths 1996) pp. 114, 115; Peter Mirfield, *Two Side-Effects of Criminal Justice and Public Order Act 1994* [1995] Crim.L.R. 612.

⁹⁰ *Parkes v R* [1976] 64 Cr App Rep 25; *R v Christie* [1914] AC 545. These exceptional common law cases in which an inference was drawn are still of importance because they have been expressly preserved by CJPOA 1994, see section 34 (5) below

mother's accusation could be inferred as meaning that he accepted the truth of the accusation. The appellant was convicted and appealed to the Judicial Committee of Privy Council on the ground that the jury had been misdirected. It was held that:

the trial judge was perfectly entitled to instruct the jury that the appellant's reactions to the accusation including his silence were matters which they could take into account along with other evidence in deciding whether the accused in fact committed the act with which he was charged"

Moreover a suspect and a police officer could be on "even terms" if the former was represented by a solicitor who provided him with any legal advice he might need. In *R v Chandler*⁹¹ the appellant was suspected by the police of being one of a gang which obtained television sets dishonestly. He was questioned by a police officer in his solicitor's presence. Both before and after caution, the appellant answered some questions but refused to answer others. The jury were directed that it was for them to decide whether the appellant had remained silent before caution in the exercise of his common law right or that he remained silent because he might have thought if he had answered he would incriminate himself. He was convicted and appealed. Although the Court of Appeal held that that the trial judge had misdirected the jury on the question of the appellant's silence, and his comment on whether the appellant had been evasive in order to protect himself could have led the jury to come to a wrong conclusion, it, however, stated that some comment by the judge on the suspect's silence before he was cautioned was justified. The Court of Appeal ruled that:

We are of the opinion that the appellant and the detective sergeant were speaking on equal terms since the former had his solicitor present to give him any advice he might have wanted and to testify, if needed, as to what had been said. We do not accept that a police officer always has an advantage over someone he is questioning. Everything depends on the circumstances. A young detective questioning a local dignitary in the course of an inquiry into alleged local government corruption may be very much at a disadvantage. This kind of situation is to be contrasted with that of a tearful housewife accused of shoplifting or of a parent on being questioned about the suspected wrongdoing of his son. Some comment on the appellant's lack of frankness before he was

⁹¹ *R v Chandler* [1976] 3 All ER 105, [1976] 1 W.L.R. 585.

cautioned was justified, provided the jury's attention was directed to the right issue which was whether in the circumstances the appellant's silence amounted to an acceptance by him of what the detective sergeant had said. If he accepted what had been said, then the next question should have been whether guilt could reasonably have been inferred from what had been accepted.

From the decisions of the above cases one may summarize the position of the common law regarding the right to silence of an accused person on three points: 1) the right to silence is an established doctrine and it follows that no inference can be drawn from the accused's silence; 2) where the accuser is an ordinary person silence of the accused person could be used in evidence against him; 3) where the accused is not under caution and he and a police officer were on "even terms" (where the accused is represented by a solicitor) his silence may amount to an acceptance by him of a charge and his guilt may be inferred from that acceptance.⁹²

Some statutes under English Law provide exceptions to the common law principle regarding the right to silence. These statutes contain provisions which oblige persons, in certain situations, to answer police questions or to provide them with information. Among these statutes are the following:

The Road Traffic Act 1988

A police officer who has reasonable grounds for thinking that a vehicle has been involved in an accident or traffic offence has the right to ask the driver to give up his driving licence and to state his date of birth. The 1988 Act not only obliges the driver to provide information about himself but it also obliges any other person to provide such information if the officer believes that the person may have such an information.

The Official Secrets Act 1991

Under the Official Secrets Act if a chief constable is satisfied that there are reasonable grounds for suspecting that an offence under the Official Secrets Act has been committed and for believing that a person is able to provide information about the offence, he can ask the Home Secretary for consent to use powers of

⁹² See Peter Mirfield, *supra*, n. 89 p. 614; J.C. Smith, *Criminal Evidence* 1995, pp. 169-172.

coercive questioning. If such permission is granted, an officer not below the rank of inspector can require the person to attend at a stated time and place and to answer questions. Failure to comply is a criminal offence. In the case of urgency the power of coercive questioning can be exercised without the Home Secretary's prior consent, but the facts should be reported immediately to him.

The Companies Act 1985

Officers and agents of companies are required by powers under ss. 431, 432 and 447 of the Companies Act 1985 to assist inspectors appointed by the Secretary of State to investigate the affairs of the company. The officers and agents of companies have a duty to produce to the inspectors any books and documents and explanations. Refusal to comply with the requirements of ss. 431, 432 may result in the offender being punished as if he had been guilty of contempt of court and constitutes a criminal offence if the refusal is in respect of the requirement of s. 447.

The Prevention of Terrorism (Temporary Provisions) Act 1989

Section 18 of the Prevention of Terrorism (Temporary Provisions) Act 1989 makes it an offence for a person who has information which he knows or believes might be of material assistance in preventing an act of terrorism or securing the apprehension, prosecution or conviction of any other person for an offence involving the commission, preparation or instigation of such an act to fail without reasonable excuse to disclose that information as soon as reasonably practicable.

The Drug Trafficking Act 1994

Section 52 of the Drug Trafficking Act 1994 makes it an offence for a person who knows or suspects that another person is engaged in drug money laundering, and the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, if he does not disclose the information or other matter to a constable as soon as reasonably practicable after it comes to his attention.

Criminal Justice Act 1987

Under section 2 of the Criminal Justice Act 1987 the Director of the Serious Fraud Office can require the person whose affairs are to be investigated or any

other person whom he has reason to believe has relevant information to attend before him at a specified time and place to answer questions and to provide information, including the production of books and papers. Failure to comply with the requirement is a criminal offence.

Criminal Justice and Public Order Act 1994

The change made by the Criminal Justice and Public Order Act 1994 does not affect the right to silence in itself. However, it affects one of its benefits, namely, that a suspect is free from the risk that silence might be taken as an indication of guilt at any subsequent trial.⁹³ Before discussing the change provided by the CJPO it is worth presenting an account of the debates and disputations about the right to silence prior to the enactment of the CJPO.

The Criminal Law Revision Committee in its Eleventh Report⁹⁴ recommended that failure during police questioning to mention any fact on which the defendant sought subsequently to rely at his trial could be made the subject of adverse comment by the prosecution and the court, and adverse inferences could be drawn against the accused from such silence or failure.

To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice....⁹⁵

This recommendation of the CLRC was rejected by the Philips Royal Commission, and its view was that if adverse inferences could be drawn from silence it might put strong pressure upon some suspects to answer questions without knowing precisely what the substance of the evidence was to support the

⁹³ Bevan and Lidstone, *The Investigation of Crime: A guide to Police Powers* (2nd edn Butterworths 1996) p. 526.

⁹⁴ Criminal Law Revision Committee Eleventh Report (Evidence(General)), 1972 Cmnd. 491

⁹⁵ *Ibid*, para. 30.

accusations against them.⁹⁶ In addition, the use of the suspect's silence as evidence against him is contrary to the principle of the accusatorial system which presumes that the onus of proof at trial be upon the prosecution.⁹⁷

The Criminal Evidence (Northern Ireland) Order 1988 adopted the recommendation of the CLRC and permitted the court to draw adverse inferences from the accused's failure, before being charged or on being charged, to mention any facts relied on in his defence at trial, and such silence can also amount to corroboration of other evidence. The Order creates other areas where adverse inferences could be drawn from the accused's silence. It provides that where a person is arrested and there is on his person, clothing, footwear or otherwise in his possession, or in any place where he was at the time of arrest "any object, substance or mark", and the officer reasonably believes that the presence of the object, substance or mark is suspicious, he may request an explanation from the suspect. Failure to provide such an explanation can be the subject of adverse inferences by the court or jury and can again amount to corroboration.⁹⁸

Moreover, if a person is found at the scene of the crime at or about the time of the crime and an officer has the same belief (as above) regarding the presence of the person, the officer may request an explanation from the suspect. Failure to give such an explanation can be made the subject of adverse inferences and can also amount to corroboration of other evidence.⁹⁹

The Home Office Working Group in its Report on the Right of Silence recommended similar changes to those which were proposed by the CLRC in its 1972 Report.¹⁰⁰ The Home Office Working Group included additional

⁹⁶ Philips Royal Commission on Criminal Procedure, Law and Procedure Volume (Cmnd. 8092-1 (1981)), para. 4.50.

⁹⁷ *Ibid.*, 4.51.

⁹⁸ The Criminal Evidence (Northern Ireland) Order 1988, Art. 5.

⁹⁹ *Ibid.*, Art. 6.

¹⁰⁰ The Report of the Home Office Work Group on the Right of Silence, July 1989.

safeguards which were not included in either CLRC's Report or in the Northern Ireland Order.¹⁰¹

The Runciman Royal Commission, like the Philips Royal Commission, recommended that the right to silence should be preserved.

The majority of us, however, believe that the possibility of an increase in the conviction of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more conviction of the innocent.¹⁰²

The Criminal Justice and Public Order Act 1994 provisions regarding the right to silence are similar but not identical to the provisions introduced by the Northern Ireland Order 1988.¹⁰³ The silence of an accused person, in order to be subject to adverse inferences under the CJPO Act, should take one of the following forms:¹⁰⁴

- a) failure to mention any fact to police either on being questioned or on being charged (s. 34 (1));
- b) failure to give an account to police of the presence (or in the case of clothing or footwear, the condition) of objects, substances or marks on his

¹⁰¹ These safeguards appear in statutory guidelines which specify the factors to be taken into account in relation to the inferences which may be drawn. The judge would have to invite the jury to consider: (1) whether the failure to mention a fact later relied on was capable of an innocent explanation; (2) whether the defendant knew the fact at the time; (3) whether it was reasonable to expect him to have disclosed it at that stage having regard to all the circumstances including the extent of his then knowledge of the case against him; and (4) any other relevant factors.

The judge would also have to ask the jury to take into account; (1) whether the suspect had been cautioned or further cautioned; (2) whether the police had noted anything said by the suspect prior to a tape-recorded interview and whether the accused was allowed to sign the record; (3) whether the accused had received legal advice before the start of an interview; (4) whether the police had delayed legal advice for the suspect or whether he had declined it himself; (5) whether the provisions of the Codes of Practice had been complied with; and (6) whether the interview was tape recorded or whether there had been a contemporaneous note.

In magistrates' courts the court would have to apply the same guidelines before deciding what inferences they could draw from the accused's failure to mention a fact.

¹⁰² Runciman Royal Commission's Report, 1993, p. 54, para. 22.

¹⁰³ Bevan and Lidstone *supra* n. 93 p. 526.

¹⁰⁴ The Criminal Justice and Public Order Act 1994, ss. 34-37.

person or in his possession or on the premises where he was found (s. 36 (1),(3));

c) failure to give an account to police of his presence at a particular place at or around the time that the crime took place (s. 37 (1));

d) failure to give evidence or to answer questions at the trial (s. 35 (3)).

The last form of silence, which permits proper inferences to be drawn from the failure of the accused to give evidence, is properly the subject of the law of evidence and will not be dealt with here.

Failure to mention facts when questioned or charged

Section 34 of the CJPO Act 1994 provides that:

(1) Where, in any proceedings against a person for an offence evidence, is given that the accused--

(a) at any time before he was charged with the offence, or on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies--

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under--

- (i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
 - (c) the court, in determining whether there is a case to answer; and
 - (d) the court or jury, in determining whether the accused is guilty of the offence charged,
- may draw such inferences from the failure as appear proper.

Although the section allows a judge or a jury to draw proper inferences from an accused's failure to mention facts which are later relied on at trial, this is surrounded by several restrictions. These restrictions relate to the time of the failure, the facts which the accused failed to mention and the circumstances which surround the time of the failure.

The section, with regard to the time at which an accused failed to mention a fact relied on at trial, states that it applies:

- a) before being charged but on being questioned under caution by a constable seeking to discover whether or by whom the offence had been committed; and
- b) on being charged with the offence or officially informed that he might be prosecuted for it.

Accordingly, if a constable questions a person whom he suspects of having committed an offence without cautioning him, the section will not apply, even if the person at his trial relies on facts which he has not mentioned before.¹⁰⁵

A new caution is provided by the Code of Practice and it is "You do not have to say anything. But it may harm your defence if you do not mention when

¹⁰⁵ See Bevan and Lidstone *supra*, n. 93 p. 531.

questioned something which you later rely on in court. Anything you do say may be given in evidence.”¹⁰⁶

The Code of Practice provides that “A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions, if it is his answers to previous questions which provide the grounds for suspicion) are put to him regarding his involvement or suspected involvement in that offence, if his answers or silence (i.e., failure or refusal to answer a question or to answer satisfactorily) may be given in evidence to a court in a prosecution.”¹⁰⁷ A person must be cautioned on arrest unless the caution has already just been given under para.10.1 or it is impracticable to give it.¹⁰⁸ The caution must also be given to a detained person where he is charged or informed that he may be prosecuted.¹⁰⁹

A constable who is trying to discover whether or by whom an offence has been committed (s. 34 (1)(a)) need not use the caution if there are as yet no grounds of suspicion.¹¹⁰

One may wonder whether the police may caution a person even before the existence of the grounds of suspicion against him, in order to take advantage of the silence of the person at that stage. Although that seems possible, it may however be considered unfair and may be excluded in accordance with section 78 of the PACE.¹¹¹

The fact which the accused failed to mention on being questioned must be one which he relies on at trial . Thus if the accused kept silence when questioned by the police and at trial he did not rely on any facts in his defence, his conduct cannot be subject to any inferences or comments. Silence itself adds nothing to

¹⁰⁶ Code of Practice C, para. 10.4.

¹⁰⁷ Ibid, para. 10.1.

¹⁰⁸ Ibid, for further discussion on questioning of a suspected person, see Wolchover and A Heaton - Armstrong *Questioning and Identification: Changes under PACE 1995* [1995] Crim LR 356 at 366.

¹⁰⁹ Ibid, para. 16.2.

¹¹⁰ Ibid, para. 10.1.

¹¹¹ See Bevan and Lidstone *supra*, n. 93 p. 531.

the prosecution's case. This is emphasized by section 38 (3) of the 1994 Act when it provides that a person cannot be convicted, nor a case to answer made out or a case transferred to the Crown Court, solely on an inference drawn under section 34 or other provisions of the Act. Facts which the accused may rely on at trial may include a defence of self-defence, provocation on a murder charge, mistake and accident.¹¹²

Before drawing any inferences from the failure of the accused to mention a fact which is relied on at a trial, the court should take account of the circumstances existing at the time of the failure at which the accused could reasonably have been expected to mention such a fact.

The circumstances which may affect the ability of the accused to mention the fact which is relied on at trial could be objective or subjective. Shock, confusion, embarrassment, a desire to protect another person and concealment of improper conduct may be considered objective circumstances and the court should take them into account when deciding whether to draw inferences or not. The accused's personal characteristics are considered as subjective circumstances, such as his physical or mental condition, and the level of his intelligence may have also have to be taken into account.¹¹³

An accused who fails to mention a fact which is relied on at trial may be able to give an explanation to the court for his failure. Whether that affects the strength and the nature of any inference to be drawn depends on the answer to the question as to whether it was reasonable to have expected him to mention it when questioned. Thus whatever the explanation was, it should be judged within the context of the answer to that question. Where the answer is affirmative the inferences will not be affected by the explanation. But where it is negative the inference may be affected by such an explanation.¹¹⁴

The question which presents itself now is whether it is proper to draw adverse inferences from silence following legal advice.

¹¹² Ibid, p. 527.

¹¹³ Ibid, p. 528; Rosemary Pallenden, *Inferences from Silence* [1995] Crim.L.R. 602, 608.

¹¹⁴ Bevan and Lidstone *supra* n. 93 p. 528.

In order to answer this question it is worth mentioning first the situation in which a solicitor may advise his client to keep silent. Among these situations may be the situation where a solicitor is informed by telephone that a suspect needs legal advice. The solicitor in this situation may often advise him to remain silent until he attends the police station.¹¹⁵ Such advice is expected to be temporary to protect the suspect from police questions at that stage. Silence may be used as a tactic in negotiations with the police to see what evidence they have against the suspect. Therefore, where the solicitor thinks that the police have only trivial evidence against his client, silence may be the proper response to the police questions.¹¹⁶ When a solicitor feels that his client is confused or is being taciturn, or lacks full confidence, or is unfit to answer a question because of the effects of drink or drugs, he will often advise him to be silent until he recovers.¹¹⁷

In spite of it being in the legitimate interest of the suspect to be silent in some situations as stated above, legal advisors should be more cautious and should be aware of the provisions of the 1994 Act to avoid the possibility of adverse inferences being drawn against their clients. In *R v Martin*¹¹⁸ the Court of Appeal of Northern Ireland, applying article 3 of the 1988 Order (equivalent to s. 34 of the 1994 Act), held that there was nothing improper in the court drawing proper inferences in such circumstances. The Court in mentioning the circumstances referred to the silence of the accused which was a result of his solicitor's advice.

In *R v Roble*¹¹⁹ the appellant admitted that he inflicted a number of knife wounds upon the complainant. However, when being interviewed by the police after his arrest he had responded, on the advice of his solicitor, with no comment. He was convicted of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. He appealed on the grounds that the

¹¹⁵ David Dixon *supra*, n. 82 pp. 243-249.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *R v. Martin* [1992] NIJB

¹¹⁹ *R v. Roble* [1997] Crim.L.R. 449.

judge's ruling and summing up in relation to the inferences to be drawn from his silence in interview were defective. The Court dismissed the appeal and held that:

legal professional privilege was not waived merely by evidence from the accused, whether on the *voire dire* or before the jury, that he had been advised not to answer questions in interview, but in itself such advice was not likely to be regarded as a sufficient reason for not mentioning facts relevant to the defence and the evidence had generally to go further and indicate the reason for that advice, because that was relevant when the jury were assessing the reasonableness of his conduct in remaining silent; if the reason was given for the advice to remain silent, this in turn was likely to amount to a waiver of privilege. In the present case the solicitor was not called before the jury, and the only evidence which they heard came from the appellant, namely that he had been advised to say nothing. This in the absence of any reason for that advice, was unlikely to inhibit the jury from drawing adverse inference. Accordingly, the judge was correct to rule in the way he did and to direct the jury that it was open to them to draw inferences from the appellant's silence.

One of the cases which clearly applied the provision of section 34 of the 1994 Act is *R v Argent*.¹²⁰ In this case the appellant was arrested for stabbing a man to death after leaving a night-club in the early hours of the morning. There were eyewitnesses to the fight. The appellant was named by one witness and picked out by two others on an identity parade. The appellant failed to answer police questions. At his trial he testified that he left the night-club before the deceased was attacked. In summing up the judge directed the jury that if they were sure that when interviewed the appellant could reasonably have been expected to mention certain facts which he had failed to mention they were entitled to draw such inferences from this failure as they thought proper. The appellant was convicted and appealed on the grounds, *inter alia*, that the judge erred in so directing the jury.

The Court of Appeal dismissed the appeal and ruled that the judge's direction to the jury was a model of succinctness and comprehensiveness.¹²¹

¹²⁰ *R v Argent* [1997] Crim.L.R. 346.

¹²¹ See the same approach in the decision of *R v Condon* [1997] Crim.L.R. 215.

Failure to account for object, substance or mark

Section 36 provides that:

(1) Where--

(a) a person is arrested by a constable, and there is--

(i) on his person; or

(ii) in or on his clothing or footwear; or

(iii) otherwise in his possession; or

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) that he or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies--

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under--

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

- (c) the court, in determining whether there is a case to answer; and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

It is clear that in order to apply section 36 the following conditions should be observed:¹²²

- 1) The accused must be under arrest at the time when he failed to explain the existence of the object, substance or mark. Therefore s. 36 does not apply, for example, where a suspect is merely stopped by the police under s. 1 of the PACE Act 1984 even if he failed to account for such an object, substance or mark. The arresting officer should be a constable and not another body charged with the duty of investigation of offences or charging offenders, with the exception of Customs and Excise officers.
- 2) The constable must reasonably believe that the presence of the object, substance or mark may be attributable to the person's participation in the commission of an offence actually specified by the constable. That means that if the accused was charged with an offence different from the one which the constable had specified to the accused s. 36 does not apply.
- 3) The constable before asking a person to account for the object, substance, or mark should warn the person in ordinary language of what may be the consequences if he fails or refuses to comply with the request. The Code of Practice provides that "For an inference to be drawn from a suspect's failure or refusal to answer a question about one of these matters or to answer it satisfactorily the interviewing officer must first tell him in ordinary language:
 - (a) what offence he is investigating;
 - (b) what fact he is asking the suspect to account for;
 - (c) that he believes this fact may be due to the suspect's taking part in the commission of the offence in question;

¹²² For detailed discussion of section 36 of the CJPO, see E Cape *Defending suspects at Police Station* (Legal Action Group, 2nd edn 1995) ch 5.

- (d) that a court may draw a proper inference if he fails or refuses to account for the fact about which he is being questioned;
- (e) that a record is being made of the interview and that it may be given in evidence if he is brought to trial.”¹²³

Failure to account for presence at the scene of an offence

Section 37 provides that:

(1) Where--

- (a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
 - (b) that he or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
 - (c) the constable informs the person that he so believes, and requests him to account for that presence; and
 - (d) the person fails or refuses to do so,
- then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies--

- (a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);
- (b) a judge, in deciding whether to grant an application made by the accused under--
 - (i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

¹²³ Code of Practice C, para. 10.5B.

- (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
- (c) the court, in determining whether there is a case to answer; and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

Section 37 deals with the situation where the suspect is being arrested and failed or refused to answer police questions in respect of his presence “at a place at or about the time the offence for which he was arrested is alleged to have been committed”. Similar conditions to those laid down by section 36 are required in order to apply section 37:

- 1) The accused must be arrested by a constable or by a Customs and Excise officer.¹²⁴ A constable must find the suspect at the scene of the offence in order to exercise his power under the said section. Therefore if the suspect, for example, is found by constable A but the suspect managed to escape, and then was later arrested by constable B far from the scene of the offence the section does not apply. On the other hand, if the suspect is arrested by constable A even a few days later, the section does apply.¹²⁵
- 2) The constable must reasonably believe that the presence of the accused may be attributable to the accused’s participation in the commission of the offence for which the accused was arrested.¹²⁶
- 3) The constable must inform the accused of his belief and request him to account for his presence¹²⁷ and tell him in ordinary language what the effect of the section would be if he failed to comply with the requirement.¹²⁸

In conclusion it must be emphasized that the CJPO does not either abolish the right to silence nor affect the burden of proof which still rests upon the

¹²⁴ The Criminal Justice and Public Order Act 1994, section 37 (4).

¹²⁵ Bevan and Lidstone *supra*, n. 93 p. 538.

¹²⁶ The Criminal Justice and Public Order Act 1994, section 37 (1)(b).

¹²⁷ *Ibid*, section 37 (1)(c).

¹²⁸ *Ibid*, section 37 (3).

prosecution. Moreover, the jury prior to the passing of the CJPO were entitled to draw inferences of guilt from an accused's silence whenever it was proper. The innovation introduced by the Act is that a judge can invite the jury to draw such inferences. It obviously appears that the prosecution cannot rely on establishing their case solely on the accused's silence or his refusal to answer.¹²⁹ There should be first a "*prima facie case*" and the silence then is used to support the case as one item of evidence.

The restrictions on the right to silence which were introduced by the CJPO raised a legal controversy in respect of their harmony with the European Convention on Human Rights. Article 6, para. 2 of the European Convention on Human Rights states that "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*". The gravamen of the controversy was whether the changes to the right of silence constituted a breach of article 6. The answer to the said question was produced by the decision of the European Court of Human Rights in the case of *Murray v. UK* (1996).¹³⁰ Mr Murray was charged with conspiracy to murder, aiding and abetting false imprisonment of a police informer and belonging to the IRA. The victim, when the police arrived to rescue him, identified Murray as one of the persons by whom he had been made captive. Murray said nothing when questioned. At his trial the judge said he drew strong inferences of guilt from the fact that Murray declined to answer questions. He appealed to the Northern Ireland Appeal Court which dismissed his appeal and held that it was inevitable that the judge would draw very strong inferences against him.

On 8 February 1996 the ECHR held that the drawing of adverse inferences from silence at the time of arrest under the Northern Ireland 1988 Order was not a breach of Article 6.¹³¹

¹²⁹ Ibid, section 38.

¹³⁰ Cases No. 41/1994/488/570; The Times, February 9, 1996.

¹³¹ See further comment by Roderick Munday, *Inferences from Silence and European Human Rights Law* [1996] Crim.L.R. 370.

Scottish Law

In Scotland persons are not obliged to answer police questions. This principle is clearly established at common law.¹³² An accused person under Scottish criminal procedure may be questioned several times during the pre-trial stage. He may be questioned when being detained since the main purpose of detention is to question him.¹³³ The accused may be questioned when under arrest, but before charge.¹³⁴ And he may be questioned when under judicial examination.

At the first two stages, namely, when an accused person is detained or is arrested, he is under no obligation to answer any of the police questions. Regarding detention, although the police are entitled to question a suspect he however, has the right to keep silence other than to give his name and address.¹³⁵ When the police put such a person under arrest they still have the power to question him and he still has the right to refuse to answer.

An accused person not only has the right to be silent but he also has the right to be informed that he is not obliged to answer questions which may incriminate himself. In *H.M. Advocate v Von*¹³⁶ the accused (Von) was charged with conspiracy in an offence of terrorism contrary to section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1976. The accused was interviewed by the police on a Saturday and told that it was an offence to withhold information about acts of terrorism under section 11 of the 1976 Act.¹³⁷ That section provided that 'If a person has information which he knows or believes might be of material assistance-(a) in preventing an act of terrorism to which this section applies, or (b) in securing the apprehension, prosecution or conviction of any

¹³² See Gane.C.H.W., & Stoddart.C.N., *Criminal Procedure In Scotland: Cases & Materials* (2nd edn W. Green/Sweet & Maxwell 1994) p. 170.

¹³³ The Criminal Procedure (Scotland) Act 1995 s. 14 (7)(a).

¹³⁴ See *Johnson v H.M. Advocate* 1993 S.C.C.R. 694.

¹³⁵ The Criminal Procedure (Scotland) Act 1995 s. 14 (9).

¹³⁶ *H.M. Advocate v Von* 1979 S.L.T. (Note) 62.

¹³⁷ Which is now section 18 (1) of the Prevention of the Terrorism (Temporary Provisions) Act 1989.

person for an offence involving the commission, preparation or instigation of an act of terrorism to which section applies, fails without reasonable excuse to disclose that information as soon as reasonably practicable-(1) in England and Wales to a constable, or (2) in Scotland, to the procurator fiscal, or (3) in Northern Ireland to a constable or a member of Her Majesty's forces, he shall be guilty of an offence'. On the day following the interview the accused stated that he wanted to make a statement. Although the officer at that moment realized that the accused was about to incriminate himself the officer merely advised him that what he said could be used in evidence. An objection was taken by the defence to the admissibility of the statement of the accused on the ground that the accused was forced to incriminate himself by drawing his attention to the provision of section 11 of the 1976 Act.

Lord Ross stated that:

If on the Sunday the accused had been given the usual full caution or had been informed that he was not obliged to give information which would incriminate himself and he had then made a statement, I would have thought that that statement would have been admissible as being a statement which had been fairly obtained and was not a statement made in response to pressure or inducement or as a result of other unfair means. In the event, however, the statement on Sunday was made by the accused after he had been told on the previous day of his obligations under s. 11 and without his ever having been told that he need not incriminate himself. That being so, I am satisfied that the statement here is not admissible.

As I have indicated, if a full caution had been given or clear advice given to the suspect that he need not incriminate himself, the statement might well have been admissible: but the only warning here given was that what he said could be used in evidence, and I do not regard that as a sufficient warning to the accused that he was not obliged to incriminate himself.

The situation regarding the right to silence of an accused where he is questioned by the procurator fiscal under judicial examination is to a considerable extent similar to the situation where the accused is questioned by the police. The accused always has the right to decline to answer questions at judicial examination. This, however may be subject to comment at trial by a prosecutor, trial judge or any co-accused in one specific situation.¹³⁸ This is

¹³⁸ See Susan Nash, *Silence as Evidence Inquisitorial Developments in England and Wales* 1996 S.L.T. (News) 69; see in general, D. B. Griffiths *Confessions* (Edinburgh, 1994).

where at trial the accused or any witness called by him presents something in evidence which could have been stated appropriately in answer to a question which he refused to answer at judicial examination. This was provided by s 20A of the Criminal Procedure (Scotland) Act 1975, as inserted by s 6(2) of the Criminal Justice (Scotland) Act 1980 and now re-enacted by ss 35 to 39 of the 1995 Act.

In *Alexander v H.M. Advocate*¹³⁹ the appellant and two other persons were charged with assault and robbery. When questioned at judicial examination by the procurator fiscal about whether they were at the locus at the relevant time and if they denied the offence, both of them replied, "On the instruction of my lawyer I don't wish to say anything". At the trial, however, they introduced a special defence of alibi and they provided evidence in support of it. The trial judge drew the jury's attention to the absence of any mention of the alibi at the judicial examination and that was something for them to assess in weighing the evidence. The appellant and other accused were convicted and the appellant appealed on the ground that there has been a miscarriage of justice in that the trial judge misdirected the jury in drawing their attention to and commenting on the appellant's failure to answer questions at judicial examination, when it was clear that such a failure had been as a result of legal advice.

The High Court held that there had been no misdirection, and the appeal was refused. Lord Brand in directing the jury stated that:

Well now, ladies and gentlemen, as I said the fact that special defences were lodged does not affect the burden of proof, but you will recollect that there were read to you transcripts of the judicial examinations of each of the accused. On 30th November each of the three accused was taken before a sheriff and examined, and the transcripts were read to you in full. You will remember that the sheriff in each case told each accused what he was there for, that is, before him, and he said that they were under no obligation to answer all or any of the procurator fiscal's questions and that they might have a discussion with their lawyers before deciding on what answers, if any, they might wish to give to a particular question.

So, again there is no mention of the alibi by the third panel. You can make what you like of the matter, ladies and gentlemen. The sheriff quite properly told each of them they did not have to answer questions and they were entitled

¹³⁹ *Alexander v H.M. Advocate* 1988 S.C.C.R. 542.

to consult their lawyer, but he also told them that if they had a defence which they could state then and they did not do so that it might go against them later. It is a matter for you to assess in weighing the evidence, ladies and gentlemen..

From the above decision one may infer that the accused's silence at the judicial examination could result in the drawing of an adverse inference against the accused even if such silence was according to legal advice.¹⁴⁰

Similar to the situation under the English law, the Scottish law contains some statutes which provide exceptions to the right to silence, and accordingly, to the principle that no one is compelled to incriminate himself. The most common example for these statutes is to be found in the Road Traffic Act 1988 and in the Financial Services Act 1986.¹⁴¹

Under section 172 of the Road Traffic Act 1988 police officers are entitled to require certain persons to tell them who was driving a motor-car at the time of an alleged offence.¹⁴² Failure to comply with such a requirement constitutes an offence.¹⁴³ Logically there is no place for a caution where a person is obliged to answer the police question. In *Foster v Farrell*¹⁴⁴ Lord Justice-Clerk (Grant) stated that:

I have no doubt that it is unnecessary to warn or caution a person before requiring him to give information under section 232. Such a warning or caution would be wholly inappropriate and out of place when the person concerned is bound by statute, and under penal sanction to give the information required.

Section 177 of the Financial Services Act 1986 empowers the Secretary of State to appoint inspectors to investigate case of insider dealing. Section 177 (3) provides that inspectors are entitled to require any person to give them information and to give all assistance he is reasonably able to give. The

¹⁴⁰ But see *Gilmour v H.M. Advocate* 1982 S.C.C.R. 590, where Lord Dunpark advised the jury to ignore all what had been stated in the judicial examination, since the silence of the accused in the examination was on the basis of his solicitor's advice.

¹⁴¹ See Alastair Brown *supra*, n. 81 p. 32.

¹⁴² The Road Traffic Act 1988 s. 172 (2)(a)(b).

¹⁴³ *Ibid*, s. 172 (3)(4).

¹⁴⁴ *Foster v Farrel* 1963 S.L.T. 182; *Tudhope v Dalgleish* 1986 S.C.C.R. 559.

inspectors are authorised to examine any such person on oath. Any statement made by such person in compliance with the requirement may be used in evidence against him.

In *Styr v H.M.*¹⁴⁵ the appellant was charged on indictment with a contravention of section 1 of the Company Securities (Insider Dealing) Act 1985. He made a statement under section 177 of the 1986 Act. An objection was taken as to the admissibility of the statement on the grounds that the statement incriminated the appellant and it took place without the accused being cautioned. The sheriff repelled the objection and the appellant appealed to the High Court. Lord Justice-Clerk (Ross) stated:

We accept that at common law a witness is not bound to answer a question which will incriminate himself. "It is a sacred and inviolable principle ... that no man is bound to incriminate himself" (*Livingstone v Murrays*, per Lord Gillies at p. 162). In our opinion, however, Parliament has clearly provided in section 177 of the Act of 1986 that any person who is able to give information regarding an offence of insider dealing is obliged to give the investigation all assistance in connection with the investigation which he is reasonably able to give. In our judgement the provisions of section 177 clearly override the common law privilege of a witness not to incriminate himself. Section 177(6) expressly provides that a statement made by a person in compliance with a requirement imposed by section 177 may be used in evidence against him. A statement could hardly be used in evidence against a person unless it was of an incriminating nature, and it thus seems clear that Parliament must have intended to override the normal privilege which a witness has against incriminating himself.

We are quite satisfied that there was no necessity for any caution to be administered to the appellant and, indeed, that it would have been wholly inappropriate for a caution to be administered. The effect of section 177 is that a person can be forced to give evidence to the inspectors and that statements made by the person may be used in evidence against him.

¹⁴⁵ *Styr v H.M. Advocate* 1993 S.C.C.R. 278.

Execution of Arrest

Execution of Arrest



Where the police have the power to arrest a person with or without a warrant have they an implied power to enter premises to effect such an arrest? What limitations exist on their power to search that person and his premises? These issues will be treated in this chapter with reference to the laws with which we are concerned. In addition the chapter discusses the right of a person illegally arrested to resist such an arrest and remedies which are available for unlawful arrest in the laws with which we are concerned.

Section (1) Entry to effect arrest

Egyptian Law

Egyptian Law contains no provisions dealing with police power to enter premises to effect arrest. The Egyptian Criminal Procedures Act 1950 Article 45, however, provides that persons of authority may not enter any occupied premises, except in such cases as are provided for in this law; in a case where help is requested from inside the premises; or in a case of fire or drowning, or the like. It thus seems that Article 45 states three cases in which the police may enter premises without warrant:

- 1) The case which is “specified in the law” is where the police have the power to enter premises to conduct a search under warrant ¹ (as will be seen throughout the discussion of search of premises below).
- 2) The case where people inside the premises ask for help. In this case the police are not only entitled to enter the premises but they are obliged to do so to assist people inside.
- 3) Cases of fire or drowning or the like. These cases might be cases of necessity which entitle the police to enter premises to carry out a necessary procedure such as to put out the fire or prevent drowning. Entry by the police into premises in the case of necessity, does not constitute search of the premises. Therefore, the police in such a case have no power to search the premises to find evidence related to any offence. However that does not mean the police cannot search the premises if they are suddenly faced with a case of *flagrante delicto*.²

The purpose of the interpretation of Article 45 is to determine whether entry to premises to effect arrest is considered a state of necessity, and if it is, whether it follows that the police can enter any premises to do so. The Cassation Court has held that although entry of premises is prohibited to the police except in cases which are stated in law, cases where people inside the house ask for help and cases of fire and drowning are not. The cases of fire and drowning are stated merely as examples since the text of Article 45 adds the words “or the like” which cover any cases of necessity which are not mentioned in the Article. Among these cases is pursuit of an accused person in order to execute an arrest warrant upon him.³ In another decision the Cassation Court held that the type of search which a police officer initially cannot carry out is a search which constitutes an intrusion into premises. As regards entry to houses and other premises not for the purpose of search, but merely to pursue or chase a person

¹ See Adley Khalel, *Al-Talabues Bel Jarimah* (Arabic) (State of flagrante delicto) Cairo 1989 p.253.

² Ibid.

³ E.D.D.C.C. Cassation No. 187 31 March 1959, p. 391.

who is subject to an arrest warrant, a police officer can enter such premises and arrest that person, since his conduct is considered as arising from a state of necessity.⁴

On the other hand, some Egyptian jurists have taken a view opposed to the Cassation Court decisions. This view considers that entry of premises for arrest amounts to a search for a person in these premises. Accordingly, the conditions applicable to searching of premises(the existence of a warrant to search) should be applied.⁵ Moreover, a state of necessity presumes that any act or procedure which is conducted by the police under it should be the only means by which a danger may be prevented. That condition does not exist in the case of entry onto premises to effect arrest, since the police have another means of gaining their objectives of arresting that person, namely, requesting for a search warrant from a competent authority.⁶

The writer's view is that entry of premises merely to affect arrest of a person is open to the police whether they are conducting it with a warrant or without if there is a state of *flagrante delicto*, since that entry is justified by procedural necessity in the interests of the investigation.

The UAE Law

Police power to enter premises to effect arrest under the UAE law is somewhat similar to the situation under Egyptian law. This can be said after the passing of the UAE Penal Procedure Act 1992. The situation was different under the Criminal Procedures (Dubai) Act 1971 where it was provided that where any person acting pursuant to an arrest warrant or a policeman who is entitled to effect arrest has reason to believe that the person whom he wants to arrest has

⁴ Ibid, Cassation No. 1701 13 January 1964, p. 52.

⁵ See Jundi Abdul Melik, *Mawso'at Al-Ijra'at Al-Jina'iyah* (Arabic) Criminal Procedures Encyclopedia vol. 2 p. 177.

⁶ See Adley Khalel supra, n. 1 p. 254.

entered or is in a place, he may enter that place to search for him.⁷ The occupier or the controller of the place was required on request to permit entry and give all available facilities for execution of the search.⁸ If the said person refused entry the authorised person might enter by force.⁹

Under the UAE 1992 Act it will be seen when discussing the search of premises upon arrest (below) that the police have no power to enter and search premises unless in particular cases. But do the police have power to enter premises in order to effect arrest? The UAE 1992 Act contains an Article which is similar to Article 45 of the Egyptian Criminal Procedures Act 1950. This Article provides that members of the public authority may not enter any occupied house, except in such cases as specified in this law, or in a case where help is requested from inside of the house or where life or property is exposed to danger.¹⁰ There seems to be nothing in this Article that indicates that the police may enter premises to effect arrest without warrant, and there is as yet no court decision which holds, as is held by the Egyptian Cassation Court, that entry to effect arrest is a state of necessity and accordingly a police officer may enter any premises for that purpose.

In spite of that, in my opinion the police may enter any premises to effect arrest where the offence, for which a person is subject to arrest, is a case of *flagrante delicto*. That is because the 1992 Act gives the police, in the cases of *flagrante delicto*, the power to enter and search an arrested person's premises, which constitutes a greater infringement as regards premises than mere entry to effect arrest.

⁷ The Criminal Procedures (Dubai) Act 1971 Art. 13/1.

⁸ Ibid, Art. 13/2.

⁹ Ibid, Art. 13/3.

¹⁰ The UAE Penal Procedures Act 1992, Art. 3.

English Law

There is no general power at common law for the police to enter premises without warrant in order to effect arrest.¹¹ In *Finnigan v Sandiford*¹² the respondent was lawfully required by a constable to undergo a breath test under section 8 (1) of the Road Traffic Act 1972. The respondent refused to comply with the requirement and went inside his house. The police entered the respondent's house without his permission, arrested him and took him to the police station. The respondent there supplied a specimen of blood which proved positive. In his trial the court dismissed the information which was proffered by the police against him on the ground that the arrest of the respondent under s. 8 (5) of the Road Traffic Act 1972, following his refusal to provide a specimen of breath, was unlawful and therefore the charge of driving with excess alcohol in his blood under s. 6 should be dismissed. The prosecution appealed to the House of Lords. The appeal was dismissed. Lord Keith of Kinkel stated that:

It may confidently be stated as a matter of general principle that the mere conferment by statute of a power to arrest without warrant in given circumstances does not carry with it any power to enter private premises without the permission of the occupier, forcibly or otherwise. Section 2 of the Criminal Law Act 1967 creates a category of "arrestable offences" in respect of which the power of arrest without warrant may be exercised. Such offences are extremely serious, being those punishable by five years' imprisonment on first conviction, and attempts thereat. Subsection (6) specifically provides:

For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be."

Apart from the category of arrestable offences, there are a considerable number of instances where a specific power of arrest without warrant is conferred in relation to particular statutory offences. In some instances power of entry is also conferred, for example by s 50 (2) of the Firearms Act 1968. In a great many others, no power of entry is conferred. The proper inference, in my

¹¹ See Zander M., *Cases and Materials on the English Legal System* (7th edn Butterworths 1996) p. 170.

¹² *Finnigan v Sandiford* [1981] 2 All ER 267.

opinion, is that, where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate. It would rarely, if ever, be possible to conclude that the power had been conferred by implication.

The above case states the situation of the law in England prior to the enactment of the Police and Criminal Evidence Act 1984. This situation however has widely changed after the passing of the 1984 Act, which provides in section 17 various instances of entry without warrant whether in order to arrest persons or to save life, limb or property. What concerns us here is the power of entry to effect arrest with or without warrant.

Section 17 (1)(a)(i) of the 1984 Act confers upon a constable the right to enter and search any premises for the purpose of executing a warrant of arrest issued in connection with or arising out of criminal proceedings. A constable may enter any premises to execute a warrant of arrest where he has reasonable ground for believing that the person concerned is on the premises even if in fact the person is not there.¹³

Section 17 (1)(b) provides that in the absence of a warrant a constable may enter and search any premises for the purpose of arresting a person for arrestable offences. It is apparent that a constable under the provision of s. 17 (1)(b) cannot enter any premises to effect arrest unless the offence for which he has entered is an arrestable one. Therefore lesser offences do not entitle a constable to enter the premises of the offender. A constable, before attempting to enter any premises, should first have reasonable grounds for suspecting that an arrestable offence has been committed, and second, reasonable grounds for believing that the person who has committed that offence is on the premises. Therefore wherever the offence for which the constable enters premises to effect arrest is not an arrestable one, this may render his entry unlawful and any subsequent arrest unlawful. This result was upheld in *Chapman v D.P.P*¹⁴ The appellant was convicted of assaulting a police officer in the execution of his duty. A police

¹³ Police and Criminal Evidence Act 1984, section 17 (2)(a).

¹⁴ *Chapman v D.P.P* [1988] Crim LR 843; *Riley v D.P.P* [1990] Crim LR 422.

officer who was assisting his colleague, who had been assaulted by six youths, saw a youth suspected of being involved and pursued him. The officer was told that the youth had entered a flat. He and two other officers went there and asked the appellant to allow them to enter after explaining to him their purpose. The appellant refused and punched the officer. The police entered the flat and arrested the appellant for assaulting the police and for obstructing an officer in the execution of his duty. The appellant appealed to the High Court and the question was whether the justices were entitled to conclude that the officer at the time of assault was exercising a statutory power of entry and so was a constable acting in the execution of his duty. The High Court allowed the appeal and quashed the conviction. It was stated that:

There must not only be reasonable grounds for suspicion or belief but the officer must in fact suspect or believe an arrestable offence to have been committed. It was fatal to the present conviction that the justices had not found as a fact the officer reasonably suspected that the offence of violent disorder, or any other arrestable offences, had been committed or any facts amounting to an arrestable offence to have occurred. Such a reasonable suspicion was the source from which all a police constable's power of summary arrest flow and the justices felt unable to make the crucial finding required by the prosecutor.

Section 17 (1)(c) provides power of entry in connection with specific offences. These powers of entry are to arrest for the following offences:

- a) offences under s. 1 of the Public Order Act 1936, the prohibition on the wearing of uniforms in connection with political objects. The power of arrest for offences under s. 7 (3) of the 1936 Act is preserved by s. 26 (2) and Sch 2 of the PACE Act 1984.
- b) any offence contained in sections 6 to 8 or section 10 of the Criminal Law Act 1977 (offences relating to entering and remaining on property).
- c) offences under section 4 of the Public Order Act 1986 (fear or provocation of violence). Entry should only be effected by a constable in uniform.¹⁵
- d) offences under section 76 of the Criminal Justice and Public Order Act 1994 (failure to comply with interim possession order). Entry should only be effected by a constable in uniform.¹⁶

¹⁵ Police and Criminal Evidence Act 1984, section 17 (3).

A constable who is acting under section 17 should keep in his consideration that he can enter and search only if he has reasonable grounds to believe that the person sought is on the premises.¹⁷

Where the premises consist of separate dwellings a constable is entitled to enter and search only the dwelling in which he reasonably believes the person to be and any communal areas on the premises.¹⁸

Since the subject of the powers in section 17 is persons, the search should be confined to them. Therefore where a constable exceeds that power and searches in places where it is inconceivable that the person be found, for example, drawers and small cabinets, he is acting outwith his powers.¹⁹

It is worth noting that section 17 of the Police and Criminal Evidence Act abolished all common law powers to enter premises without a warrant, except powers to deal with or prevent a breach of the peace.²⁰

In *McLeod v Metropolitan Police Comr*²¹ the Court of Appeal, Civil Division, held that at common law the police had the power to enter premises without a warrant to prevent a breach of the peace occurring there, if they reasonably believed a breach was likely to occur on the premises.

Scottish Law

Unlike the situation in England the law in Scotland contains no statutory provision governing the power of entry to effect arrest. This does not however mean that there is an absolute rule that a constable cannot enter premises to arrest a person with or without a warrant. The power of entry depends on

¹⁶ Ibid.

¹⁷ Ibid, section 17 (2)(a).

¹⁸ Ibid, section 17 (2)(b).

¹⁹ Ibid, section 17 (4); see Bevan and Lidstone, *The Investigation of Crime; A guide to Police Powers* (2nd edn Butterworths 1996) p. 134.

²⁰ Police and Criminal Evidence Act 1984, section 17 (6).

²¹ *McLeod v Metropolitan Police Comr* [1994] 4 All ER 553.

whether the offence for which a constable wants to carry out an arrest is a common law offence or a statutory offence. Where the offence is one under the common law and the constable has the power to effect arrest under a warrant he according to Hume is entitled to enter any premises to effect such arrest under a warrant, but after requiring the occupier of the premises to allow him to enter and such requirement is refused. Hume stated:²²

No officer shall in any case be justified for breaking open doors, to execute his warrant [to arrest] unless he has notified his errand to those within, and demanded entrance. But, under that condition, he has a right by our law, though it may be otherwise in England, to break open the doors of a house, to take the person mentioned in his warrant; and this, whether he is certainly known to be the guilty person, or is charged only on probable suspicion; and equally in his own house, or at that of another person, where he is, or is on probable suspicion believed to be, at the time.

Where the constable is carrying out an arrest but without a warrant two situations should be distinguished. First, where the offence for which the constable wants to carry out an arrest is a serious offence, and second, where the offence is merely a breach of the peace or other minor offence. In the first situation the constable is entitled to enter the premises to effect the arrest but under the previous condition (first requiring the occupier to allow him to enter). In the second situation the constable has no such power. Hume stated:²³

In cases of breach of the peace, or violent threats of immediate mischief as also in cases of felony which he has seen committed, or has information from others who are sure of the fact, the like power of arresting belongs to a constable, or other officer of the law, proper to the execution of criminal warrants ... As to the breaking open of doors on such occasions, I have not found any authority, to warrant a constable doing so, in his pursuit of one who flies after committing a breach of the peace; but rather a direction to him, in the act 1717, c. 8 to take notice of the master of the house, that he may be afterwards challenged for his contempt, in refusing admission. But it is not to be imagined, that a constable shall be subject to the like restraint in cases of murder, housebreaking, robbery or the like, committed in his presence, or known to him by complaint of others who were present, or have been the sufferers on such occasions.

²² Hume, *Crime*, ii p. 80.

²³ *Ibid*, pp. 75, 6.

Regarding statutory offences, the law in Scotland is not clear whether a constable is entitled to enter premises to effect arrest for a statutory offence or not. However there is one court decision from which one might infer that a constable may have the power to enter premises to effect arrest in particular circumstances.

In *Turnbull v Scott*²⁴ the police went to the appellant's house to detain him under section 2 of the Criminal Justice (Scotland) Act 1980. The police saw him at a window of the house but he did not open the front door to allow them to enter. They went to the back of the house where they found a door lying ajar and entered the house. They were at that time unsure whether the appellant was still in and called out to him but he kept silent. They went upstairs to a room with a closed door from which the appellant came out and attacked them. He was convicted of resisting constables in the execution of their duty and appealed to the High Court.

Lord Cowie stated that:

Now it is clear that the officers in the present case entered the appellant's house uninvited, but there is no absolute rule that police officers may only enter private premises if they have a warrant or statutory authority to do so. However, if they so enter, the question whether what they have done was unlawful and went beyond the execution of their duties must in our view be dependent on the particular circumstances of each case..... Obviously the position might have been different if the appellant had shouted from the window that the police officers were to go away and that he did not want them on his property or, indeed, if the back door had been shut, but we are not in that position in this case and therefore we express no view about what might have been the legal position in that situation. What we have here is police officers attempting to detain somebody and, after making all possible efforts to get the appellant to respond to their knocking and finding that he may well have left the house, entering it in order to see whether he was still there. In those circumstances we have no hesitation in saying that they were acting in the execution of their duty when they crossed the threshold. Indeed, we might go so far as to say that they would have been failing in their duty had they not done so.

Although this decision is related to the police powers to enter premises to detain under s. 2 of the Criminal Justice (Scotland) Act 1980 (now under s. 14 of the Criminal Procedure (Scotland) Act 1995), that decision may also be applied

²⁴ *Turnbull v Scott* 1990 S.C.C.R. 614.

to police powers to enter premises to effect arrest, since such power, as stated in the decision, is a question of circumstances.²⁵

Section (2) Search Upon Arrest

Egyptian Law

Search of persons

The Egyptian Criminal Procedures Act 1950 Article 46 (1) provides that “in cases where a judicial police officer can lawfully arrest an accused person he may search him”. It is clear from the provision of the Article that the police have a power to search any person where they have the right to arrest him whether with or without a warrant. As has been discussed the only case in which the police may arrest a person without a warrant is the case of *flagrante delicto*. Therefore, a judicial police officer can search a person if there is a case of *flagrante delicto* or if he is in possession of an arrest warrant.²⁶

In support of the right to search a person under Article 46 (1) it has been said that the infringement on a person’s privacy which may be caused by the search, is less than that which may be caused by arresting him.²⁷ The right of the police to search a person in cases where they have the right to arrest him, exists not only when are they actually arresting that person, but also where they are entitled to arrest him.²⁸ For example, where a judicial police officer witnesses a person in the act of stealing an item from a shop and concealing it in his pocket, the officer may search him in order to find that item and he may then arrest him. In practice however, arrest is often an preliminary step to searching a person in order to prevent him from escaping or resisting the search.

²⁵ See Gane.C.H.W., & Stoddart.C.N., *Criminal Procedure In Scotland: Cases & Materials* (2nd edn W. Green/Sweet & Maxwell 1994) p. 147.

²⁶ The Egyptian Criminal Procedures Act 1950 Arts, 34, 35.

²⁷ Husni. M.N., *Al-Qabdh Ala Al-Ashkhas* (Arabic) (Arrest of persons) Searches and Studies Centre of Fighting Crime and Criminal treatment, 1994 p. 64.

²⁸ *Ibid*, p. 65; E.D.D.C.C. Cassation No. 85/8, 1967 p. 195.

A question may arise regarding what type of search of the person is permitted under the provisions of Article 46 (1); that is, what is the aim of the search? Is it to find evidential material related to an offence, or merely to seize any article from the arrested person which he may use to cause injury to himself or others or that may assist him to abscond? There are two views regarding this issue. The first view says that the power of search which is granted to the police by Article 46 (1) is a protective power, which means that the police when searching an arrested person should confine their search to the seizing of any material from the arrestee which may be used to injure himself or others or to assist him to abscond.²⁹ The second view says that the provision of Article 46 is general and it covers the two types of search.³⁰ The Egyptian Cassation Court has upheld the second view in several cases.³¹ One of the cases which shows this approach took place in 1986. A police officer saw the appellant who had absconded from police surveillance. The officer arrested and searched him before placing him in custody. He was found to be in possession of drugs. He was convicted and appealed to the Cassation Court on the ground that the search which followed arrest was unlawful, since the police officer exceeded his power in searching the appellant for drugs. The appellant's representative submitted that when arresting a person, the police power to search him should be confined to a search for material which may be used to assist him to abscond or cause injury to himself or others, and should not include finding evidential material. The Cassation Court held that Article 34 of the Criminal Procedures Act 1950 gives a police officer power to arrest an accused person who has committed an offence of breach of surveillance....and Article 46 of the same Act provides that "in cases where a judicial police officer can lawfully arrest an accused he may search him". Therefore the search of the appellant was lawful since it followed a lawful

²⁹ El Shehawi T., *Sultat Mamur Al-Dabt Al-Quada'i Fi Tafteash Al-Shakhs Fi kair Halat Al-Talabuse* Majallat Al-Muhamah 8 April 1952 (Arabic) (The Judicial Police Power in Arresting A person other than in *Flagrante delicto*) Legal Profession Journal p. 1198; Adley khaleel supra, n. 1 p. 225.

³⁰ Husni.M.H., supra, n. 27 p. 65; Mohammad. A., *Qanun Al-Ijra'at Al-Jina'iyah Al-Zuz' Al-Awwal* (Arabic) (Criminal Procedure part I) p. 373.

³¹ Cassation No. 4064/56, 13 November 1986, The National Centre of Judicial Studies (Egypt).

arrest, and the wording of Article 46 regarding search is general. Accordingly the appeal was refused.

The provision of Article 46 (1) which correlates the police power to search a person without warrant with their power to arrest him leads to two results:

First, where procedures which are resorted to do not amount, under the Egyptian Criminal Procedures Law, to an arrest in its technical legal sense, such as arrest by persons of public authority or by a private citizen in the case of *flagrante delicto* or where a judicial police officer is entitled to carry out protective procedures in particular cases, such procedures do not entitle the person who executes them to search the person who is submitted to them. The search which the police or other persons are forbidden to conduct in these circumstances is a search for evidence; a search to seize articles from the person which may be used to harm people may be conducted since such search is justified by necessity.³²

Second, whenever an arrest of a person is unlawful his search as a result is also unlawful. Therefore any evidence resulting from such a search should be inadmissible. The Egyptian Cassation Court in one of its decisions³³ reversed a conviction against an appellant on the ground that the evidence which incriminated the appellant was obtained by unlawful arrest. In that case the appellant, who was known to a police officer as a drug dealer, was seen by the police carrying a box, and as soon as he saw the officer tried to abscond. However the officer stopped him and asked him about the contents of the box. The appellant said it contained lawful medicines, but the officer did not believe him and he took the appellant to the CID office. The box was examined by the chief officer of the CID office, and it turned out that it contained unlawful drugs. The appellant was convicted and appealed to the Cassation Court. In his trial the court held that it is an established rule that justice could be detrimentally affected by the escape of a criminal from punishment, but the oppression of the liberties

³² E.D.D.C.C.Cassation No. 50, 23 February 1959 p. 230.

³³ Ibid, Cassation No. 151, 21 October 1986 p. 788.

of individuals has a greater effect on justice. It continued that a state of *flagrante delicto* which gives a police officer the right to arrest persons without warrant, is a state which pertains to the offence not to the offender. Therefore, the procedure which was carried out against the appellant was an unjustified arrest, since Article 34 of Criminal Procedures Act, as amended by the 1972 Act No 37, does not permit a judicial police officer to arrest an accused person unless in the case of *flagrante delicto*.

Where a judicial police officer has power to search an arrested person he can search his external body parts. The officer may ask the arrestee to open his hand or even his mouth in order to discover any concealed items. Furthermore, the officer may be require the arrestee to take his clothes off to search his body or search inside the clothes. The search may include the person's belongings which are under his control or in his possession, such as a briefcase. Search of an arrested person may extend to an intimate search where an officer has reasonable grounds to believe that the arrestee is concealing in his body orifices evidential material relating to an offence. This type of search is often carried out by a doctor and it may be carried out with reasonable force.³⁴ The Egyptian Cassation Court has held that where the force used against the accused was within the limits necessary to enable a hospital doctor to obtain the contents of the accused's stomach, the procedure was lawful.³⁵

One issue which may arise in the context of discussing the power of the police to search an arrested person, is the power of the police to search an arrested person's car. Again this is a contentious issue among Egyptian jurists.

One group of jurists equate search of a person's vehicle with search of the person's premises, and as being entirely prohibited unless the police have a warrant to do so (as will be seen below). Therefore, even if the police can search

³⁴ Adlley khaleel supra, n. 1 p. 226.

³⁵ E.D.D.C.Cassation No. 89, 12 March 1972, p. 195.

an arrested person in particular cases they have no power to search his car without a warrant.³⁶

The other group of jurists distinguishes between two situations.³⁷ The situation where the car is at the house of the arrestee or in its annex and the situation where the car is elsewhere. In the first situation the car is virtually considered as a part of the house and it deserves the same privacy as the house and the police cannot search it without warrant. In the second situation the car enjoys the same privacy as the person who owns or controls it and accordingly the police may search it whenever they have the right to search that person. The Egyptian Cassation Court's decisions are established on the principle that whenever the police have the power to search a person they have the same power to search a car in his possession.³⁸

Where an arrested person is a female her search should be carried out by a person of the same sex. Article 46 (2) of the 1950 Act provides "If the accused is female, the search must be conducted by a female to be authorised for this purpose by the judicial police officer." Therefore a male police officer cannot search an accused female unless his act involves no contact with the female private parts. Accordingly, if a male police officer puts his hand upon a female breast in order to take out some piece of drug, his conduct is unlawful. The officer however, can search the female for that drug if she has concealed it in her hand since that search constitutes no infringement of a female's privacy. A male police officer still cannot search a female even if she has no objection to that search, since this is one of the public order principles any breach of which renders any procedure unlawful.³⁹

³⁶ Salamah. M., *Al-Ijra'at Al-Jina'iyah Fi Al-Tashri Al-Misri* (Arabic) (Criminal Procedure in Egyptian Legislation) Cairo 1988 p. 434.

³⁷ Husni. M.N., *Sharh Qanun Al-Ijra'at Al-Jina'iyah Dar Al-nehdah Al-arabiah* (Arabic) (Explanation of the Criminal Procedure Law) Cairo University Press, 1988 p. 575.

³⁸ E.D.D.C.C. Cassation No. 242, 30 June 1938 p. 268.

³⁹ Husni. M.N., *supra*, n. 37 p. 578.

Search of premises

Article 47 of the 1950 Act entitles a judicial police officer to search an arrested person's residence in the case of *flagrante delicto*, where it appears to the officer that the person has concealed in it articles or documents which may help in disclosure of the truth. In 1984 the High Constitutional Court decided that Article 47 was unconstitutional due to the fact that it was in conflict with Article 44 of the 1971 Constitution which states that residences have a sanctity, thus to enter or search them is impermissible without a justified warrant in accordance with the law. After that decision the police have had absolutely no power to search residences without warrant even if an accused is caught red-handed.

One may wonder which kind of premises could qualify as a residence and accordingly should enjoy the sanctity mentioned in the Constitution. Both the 1950 Act and the 1971 Constitution contain no definition of premises or places which are considered residences. This, however, can be found in the decisions of the Cassation Court. The Court in one of its decisions defined "residence" as the place where a person lives and keeps his private things, and which nobody is allowed to enter without his permission. That place is still called a residence whether it is owned by the person, or he is merely a tenant, and regardless of the length of his residence.⁴⁰ Therefore, the police have no power to search without warrant an arrested person's house or the room in a hotel in which he has lived. On the other hand the police can, for example, search an arrested person's office or store, where such a place is not designed as a residence. It is important to mention here that where an arrested person is a solicitor the police cannot search his office even where the offence is in the case of *flagrante delicto*. Such a search is only permitted to members of the public prosecution. Furthermore a prosecutor who is entitled to conduct such a search has no power to delegate a police officer to carry it out on his behalf.⁴¹

⁴⁰ Cassation No 3/25, 27 January 1974, p. 58.

⁴¹ Article 51/1 of the Legal Profession Act No 17 1983.

The UAE Law

Search of persons

The UAE law with respect to search of a person under arrest is to a considerable extent similar to the Egyptian law. Before the enactment of the UAE Penal Procedures Act 1992, search of an arrested person was governed by the Criminal Procedures (Dubai) Act 1971 and the Court Criminal Procedures (Abu-Dhabi) Act 1970. The 1971 Act provided that where a policeman is arresting a person or where he is receiving an arrested person he should search that person or he may order such a search and he should preserve in a secure place any article which may be found on him.⁴² The 1970 Act provided that any person who is lawfully arrested is subject to police search.⁴³ It was not clear under both laws whether the purpose of the search of an arrested person was to find evidential material related to the offence for which the person was arrested, or merely to seize articles which might be used to cause injury or to assist the person to abscond. In practice, however, the search was carried out in order to gain both results.

When the UAE Penal Procedures Act 1992 came into force on 14th October 1992 it established a general rule that judicial police officers have the power to search any person in cases where they are entitled to arrest him. Article 51 states that “the judicial police officer may search the accused in cases where he can be lawfully arrested. The accused should be searched by checking his body, clothes or personal effects for any traces, signs or other things related to the offence or necessary for investigation thereof.” It is obvious that the object of the search of a person under Article 51 is to find evidential materials related to the offence for which that person was arrested. Nevertheless this does not mean that the police cannot search that person in order to seize any article which may be concealed in his body or clothes which may be used to injure himself or others or to assist him to escape, since this search is worthy of being conducted. As in Egyptian law, a

⁴² The Criminal Procedures (Dubai) Act 1971 Art 20.

⁴³ The Court Criminal Procedures (Abu-Dhabi) Act 1970 Art 12/1.

judicial police officer cannot merely search a person whom he is actually arresting but can also search a person whom he is entitled to arrest. Therefore the officer may search a person without arresting him in the case where the person is one upon whom the police may carry out an arrest.

By virtue of Article 51 of the 1992 Act a judicial police officer has vast powers to search a person whom he has arrested or is entitled to arrest. The officer has power to search an arrestee's clothes, and the provision of Article 51 comes without any specification of the kind of clothes which the officer may search. Accordingly, the officer may search even the arrestee's underwear.

Any personal effects of the arrestee are subject to search, such as his briefcase or anything he is carrying or has in his possession. Moreover the arrestee may be required to submit to a body search, even of his private parts, since the wording of Article 51 is general and unrestricted. The police officer may ask the arrestee to take a blood or urine test.

The wide powers which are granted to the police by Article 51 with regard to the search of a person under arrest should ideally be accompanied by strong safeguards in favour of the arrestee. However, the 1992 Act contains no such safeguards save that Article 51 states that the object of searching an arrested person is for "any traces, signs or other things related to the offence or necessary for its investigation". And Article 36 of the same Act states "all measures taken by judicial police officers should be recorded in minutes and duly signed by them, showing the time at which such actions were taken and the place of their occurrence...". It is obvious that the scope of Article 36 is not confined only to searching of persons but applies to all measures which may be conducted by judicial police officers. Therefore the only specific safeguard for a person searched is that stated by Article 51 with respect to the objectives of the search. A judicial police officer in searching an arrested person must confine the aim of his search to what is stated in Article 51. Therefore, where a police officer, for example, exceeds that objective and searches an arrested person for evidence related to other offences, this search should be unlawful and its results should be

rejected. There is a decision to this effect made by the High Federal Court.⁴⁴ The defendant was wanted by the police for assault, attempted abduction and buggery, and several traffic offences. The public prosecution granted the police a warrant to arrest and search the defendant for the said offences. The police went to the defendant's house and arrested him. The police suspected that the defendant was consuming drugs and therefore took a urine sample from him which confirmed their suspicion. The defendant was convicted of consuming drugs contrary to Articles 1,6,39 of the 1986 Act on controlling drugs. He appealed to the Appeal Court, which upheld the conviction. Subsequently, he appealed to the High Federal Court. The High Federal Court held that, although search of a person is one of the most important effects which results from a warrant of arrest, the initial rule in this regard is that the judicial police officer who effects the search should not exceed the power which is granted to him by the warrant. The Court continued by saying that the aim of the search is to seize articles which were used in the commission, or resulted from the commission, of a particular offence. This is what is known as "specification of search". Therefore, the police misused their power in taking a urine sample from the appellant; their procedures were unlawful and any result which emerged from that was inadmissible in evidence.

Where an arrested person is a female the searching person should be a female whether she is a member of the police or not. Article 52 of the 1992 Act provides that "where the accused is a female, the search must be conducted by a female authorized for this purpose by a judicial police officer after taking an oath that she will perform her duty honestly and faithfully and the witness of the search should also be a woman". This provision is approximately similar to the Egyptian provision except that the latter does not require an oath to be sworn by the women who conduct the search.

One may note that although the Egyptian law and the UAE law emphasise that a female accused should be searched by an officer or a person of the same

⁴⁴ The High Federal Court, cassation No. 343 13 May 1995.

sex, none of them contain a provision dealing with the case where the accused is a male and the officer who is entitled to search him is a female. This situation could occur since the police forces of both countries contain female officers. Therefore, it may be advisable for both laws to alter the relevant provision to a general provision which may provide that the search should be conducted by an officer or a person of the same sex as the person searched.

Search of premises

Before the passing of the UAE Penal Procedures Act 1992, a policeman was entitled under the Criminal Procedures (Dubai) Act 1971 ⁴⁵ to enter and search any premises in a case where he was pursuing or searching for a person whom he suspected of committing an arrestable offence, and he believed that items which were used in or resulted from the offence were on the premises.

Article 53 of the 1992 Act provides that “A judicial police officer may not search the house of the accused without a written warrant from the public prosecution unless the offence is red-handed and there is strong evidence that the accused conceals in his house objects or documents which would help in the disclosure of the truth.” It is apparent that the powers of the police to search an arrested person’s house are less than their powers to search that person personally. The search of the house of an arrested person requires two elements. First, the offence for which the person is arrested must be red-handed. Second, the existence of strong evidence indicating that the person is concealing in his house objects or documents, and these objects or documents would help in the disclosure of the truth. The evidence which may indicate that an arrested person is concealing in his house such things is subject to police discretion under the supervision of the court.

In addition the police, even in cases other than red-handed offences, have a power to search an arrested person’s house if that person is placed by law or

⁴⁵ The Criminal Procedures (Dubai) Act 1971 Art 42.

court order under police surveillance and there are strong reasons to believe that he has committed a felony or misdemeanour.⁴⁶

The UAE Penal Procedures Act 1992 requires a judicial police officer when searching the house of a person to consider the following points:

1. The house of the person under arrest may not be searched except to look for things related to the offence in respect of which evidence is being compiled or investigated. However, if during the search it incidentally appears that there are things there, the possession of which is considered an offence or which help in revealing the truth of another offence, the judicial officer may seize them.⁴⁷
2. Search of an arrested person's house should be conducted where possible in the presence of the person or someone acting on his behalf; otherwise it should be conducted in the presence of two witnesses. Such witnesses should preferably be mature relatives or those residing with him in the house, or neighbours, and such measures should be recorded.⁴⁸
3. If there are women in the house and the purpose of the entry was not to arrest or search them, the judicial police officer should observe the current traditions in dealing with them and should enable them to use the veil or to leave the house and he should give them the necessary facilities without prejudice to the interest of the search and its outcome.⁴⁹
4. If during the search of the arrested person's house a conclusive presumption arises against him or against any person in the house showing that he is hiding on his person something useful in revealing the truth, the judicial police officer may search him.⁵⁰

⁴⁶ The UAE Penal Procedures Act 1992 Art 54.

⁴⁷ Ibid, Art 55.

⁴⁸ Ibid, Art 59.

⁴⁹ Ibid, Art 36.

⁵⁰ Ibid, Art 57.

5. If sealed or otherwise locked documents are found in the arrested person's house, the judicial police officer may not open them, but he should write particulars of them down in the search record and present them to the public prosecution.⁵¹
6. The judicial police officer has the right to put seals on places and things which carry marks that help in revealing the truth. He may post guards to watch them and should immediately inform the public prosecution. Anyone concerned may complain against this procedure to the president of the court of first instance or to the competent judge, as the case may be, through a petition submitted to the public prosecution, who should immediately refer the grievance to the president of the court or to the judge together with its comments.⁵²
7. The judicial police officer when searching a house may seize things which are likely to have been used in committing an offence or to have resulted therefrom, or on which the offence might have been committed, and everything else that helps uncover the truth. Things which maybe seized should be sorted out and shown to the arrestee, who will be asked to give his comments thereon. A record should be made and signed by the arrestee. If he refuses to do so that should be recorded. Documents and things seized should be kept in a locked safe sealed with red wax. The date of the record specifying the things seized should be written on the safe in which the things have been kept, and reference should be made to the purpose for which the seizure took place.⁵³
8. When removing seals from things and places which have been sealed according to the provisions of Articles 60, 61, this should be done in the presence of the arrestee or his representative and of those from whom the

⁵¹ Ibid, Art 58.

⁵² Ibid, Art 60.

⁵³ Ibid, Art 61.

things have been seized, after summoning them to appear and attend the removal of said seals.⁵⁴

9. Any person who, because of a search, has access to information about things that were subjected to the search and who discloses such information to an unauthorised person or benefits from them in any way, is subject to punishment prescribed for the offence of disclosure of secrets.⁵⁵
10. If the person from whom documents are seized has an urgent interest therein, a copy thereof certified by the public prosecution must be given to him without prejudice to the object of the investigation.⁵⁶

English Law

Search of persons

When a person is arrested, it is normally open to the police to search him. At common law search of a person upon arrest is unlawful unless the police have reasonable grounds for believing that he possesses a weapon or has about him evidential material relating to the offence for which he was arrested.⁵⁷ A constable should rely upon objective factors for his belief that the arrested person is concealing a weapon or evidential material connected with the offence in question. Therefore, relying on mere general rules that an arrested person should be searched to protect him or others from injury which may be caused by him, or to find an article which may be considered evidential material relating to the offence, does not justify such a search. In *Lindley v Rutter*⁵⁸ the defendant had been arrested on a charge of being drunk and disorderly and taken to the police station. A female constable asked the defendant at the police station if she would

⁵⁴ Ibid, Art 62.

⁵⁵ Ibid, Art 63.

⁵⁶ Ibid, Art 64.

⁵⁷ *Dillon v O'Brien* (1887) 61 Cox CC 245.

⁵⁸ *Lindley v Rutte* [1980] 3 W.L.R. 660.

allow herself to be searched but she refused. However, the constable attempted to search the defendant and to remove her bra for her own protection, in accordance with the standing order of the chief constable which applied to any female person arrested and placed in a cell. The defendant resisted the search and scratched the constable's hand and kicked her knee, which resulted in her falling to the floor. The search was continued with the assistance of another female constable and the defendant's brassiere was removed. The court found that the defendant was guilty of disorderly behaviour while drunk and of assaulting a constable in the execution of her duty. The defendant appealed on the grounds that the police constable was not acting in the execution of her duty in removing or attempting to remove an article of the defendant's clothing. The conviction of the defendant was quashed on the ground that the police had exceeded their powers in removing the defendant's brassiere "for her own protection". Lord Justice Donaldson said that:

It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes these rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole. It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of a particular case. Indeed, there would have had to have been some evidence that young female drunks in general were liable to injure themselves with their brassieres or that the defendant had shown a peculiar disposition to do so. It would obviously be a justification if the defendant had by words or conduct threatened to do so. But that is not this case.

The finding in the above case was emphasised in *Brazil v Chief Constable*.⁵⁹ A woman had been arrested and twice assaulted a police officer while being

⁵⁹ *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537.

searched in the police station. She was convicted of both assaults and she appealed against both convictions on the grounds that the police officers were not acting in the execution of their duty. Regarding the first search the police were relying on the general rule that persons should be searched for their own safety and that rule, as seen in *Lindley v Rutter* above, does not make such a search always necessary. As regards the second search, the defendant had not been informed of any reason for the search. The appeal on both charges was allowed and the convictions quashed.

What can be drawn from the decisions in the above cases is that the search of persons under arrest is unlawful unless that search is justified by belief on reasonable grounds that that person possesses a weapon or has about him evidential material relating to the offence for which he was arrested. The general rule that persons under arrest at the police station should be searched on a standing order from a senior officer allowing such a search, without specific circumstances making it necessary, is not enough to justify searching such persons. The person under arrest should be given a reason for the search before he may be searched by a constable.

The Police and Criminal Evidence Act 1984 gives the police the power to search a person arrested at a place other than a police station. This power of search is given to a constable by section 32 whether that arrest was for an arrestable offence (s.24), under general arrest power (s.25), a preserved statutory power of arrest, a statutory power of arrest created since the passing of the 1984 Act, or under a common law power of arrest.

Section 32 (1) provides that a constable is entitled to search a person arrested other than at a police station if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or to others.

It is apparent from the provision of section 32 (1) that the search is for articles which might be used to cause physical injury to the arrested person or others. And it is worth noting that the Act does not require from a constable reasonable grounds for believing that the arrested person has such articles. The

reasonable ground is only required regarding the belief that the arrested person may present a danger to himself or others.⁶⁰

Section 32 (2) entitles the police to search the arrested person for articles which might be used to assist him to escape from lawful custody or might be evidence relating to an offence. Section 32 (5) makes the power to search the arrested person unlawful unless the constable who may exercise it has reasonable grounds for believing that the arrested person may have something concealed about him for which such a search is permitted.

Power to search an arrested person under s.32(2) is limited to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence. A person searched in public cannot be required to take off anything other than his coat, jacket or gloves.⁶¹

Prior to the passing of the Criminal Justice and Public Order Act 1994, search of persons under s.32(4) did not include searching the mouth of an arrested person. Section 118 of the 1984 Act defined an “intimate search” as “a search which consists of the physical examination of person’s body orifices.” However, the police found some comfort in the decision of *R v Hughes*⁶² where the Court of Appeal held that forcing a person to spit out a drug which he had concealed in his mouth was not an intimate search within s. 55, there being no physical intrusion into a body orifice.

The Criminal Justice and Public Order Act 1994 section 59 adopted the decision of the Court of Appeal. It redefined “intimate search” by adding the words “other than the mouth” to the former definition. Thus an “intimate search” means “a search which consists of the physical examination of a person’s body orifices other than the mouth”.

When a person has been arrested and detained at a police station the police have the power to search him whether to obtain evidence in connection with the

⁶⁰ See Bevan and Lidstone *supra*. N. 19 p. 302.

⁶¹ The Police and Criminal Evidence Act 1984, section 32 (4).

⁶² *R v Hughes* 1995 Crim LR 407.

offence for which he has been arrested or in order to seize articles which might be used to assist him to escape or to cause injury to himself or others.

The Police and Criminal Evidence Act gives the police such powers to search a person who has been arrested and detained at a police station and it distinguishes between non-intimate searches and intimate searches.

Non-intimate search is provided by s.54 and it covers all types of search except intimate searches which are defined as “the physical examination of a person’s body orifices other than the mouth”.

The persons who may be subjected to a non-intimate search are those mentioned by s.54(1); namely persons

- 1) brought to a police station after being arrested elsewhere;
- 2) committed to a police station by an order or sentence of a court;
- 3) arrested at a police station or detained there;
- 4) detained at a police station having been arrested and bailed to return to the police station and, who having done so, are, by virtue of s.34(7), to be treated as having been arrested for the offence in connection with which they have been bailed.

A person who has been arrested at a police station may be searched only if the custody officer considers it necessary in order to make a complete list of all his property and only to the extent that the custody officer considers it necessary for that purpose.⁶³ The police can also search anyone in police custody whether at a police station or elsewhere to ascertain whether he has with him anything which he could use to cause physical injury, damage property, interfere with evidence or assist him to escape.⁶⁴

One may note that the 1984 Act gives a custody officer a large degree of discretion on whether to search an arrested person or not, and the scope of the search may include every type, even strip search, but not “intimate search”. However, that can not give the police the right to search all suspects as a matter

⁶³ The Police and Criminal Evidence Act 1984, section 54 (6).

⁶⁴ Ibid, section 54 (6)(a).

of course or routine.⁶⁵ On the other hand Code of Practice C provides that where search of a person is unnecessary, for example, where a person will be detained for only a short period and is not placed in a cell, the custody officer may decide not to search him. That means that only where a search of a person is necessary is the custody officer entitled to carry it out, such as where it clear that the “the custody officer will have continuing duties in relation to the person or where that person’s behaviour or offence makes an inventory appropriate”.⁶⁶

A non-intimate search should be carried out by a constable and he should be of the same sex as the person searched.⁶⁷ The custody officer may retain anything which is found as a result of the search of a person, except articles subject to legal professional privilege, and clothes and personal effects.⁶⁸ Even clothes and personal effects may be retained by the custody officer if he believes that they might be used by the arrested person to cause physical injury to himself or others, to damage property, to interfere with evidence or to assist him to escape.⁶⁹ He may seize and retain such items where he has reasonable grounds for believing that they may be evidence relating to an offence.⁷⁰

A person whose property is seized must be told the reason for the seizure unless he is either a) likely to become violent or b) incapable of understanding what is said to him;⁷¹ and the reason must be recorded.⁷²

A constable’s power to conduct a non-intimate search against an arrested person is not confined to a superficial search, but may include a ‘strip search’ which involves the removal of more than outer clothing.⁷³ It is obvious that such a search constitutes a humiliation and trespass of an arrestee’s person. Therefore it

⁶⁵ *Sheehan v Metropolitan Police Comr* 1990 LAG Bulletin, July, p. 23.

⁶⁶ The Code of Practice C Note 4 A.

⁶⁷ The Police and Criminal Evidence Act 1984, section 54 (9),(8).

⁶⁸ *Ibid*, subs (3).

⁶⁹ *Ibid*, subs (4)(a).

⁷⁰ *Ibid*, subs (4)(b).

⁷¹ *Ibid*, subs (5).

⁷² Code C para, 4.5.

⁷³ *Ibid*, Annex A(B) 9.

should be surrounded by safeguards in order to limit it in the interests of the dignity of the person searched.

The Code of Practice emphasises that ‘a strip search is only allowed if the custody officer considers it to be necessary in order to remove an article which a person is not allowed to keep, and the officer reasonably considers that the person might have concealed such an article’.⁷⁴

Moreover the Code of Practice makes it clear that ‘the strip search should not be routinely carried out where there is no reason to consider that articles have been concealed’.⁷⁵ It provides that:

- a) the police officer carrying out a strip search should be of the same sex as the person searched.
- b) the search should take place where it cannot be seen by any person who does not need to be present, especially by a member of the opposite sex; except an appropriate adult with the consent of the person searched.
- c) the presence of more than two persons, other than an appropriate adult, should be permitted only in the most exceptional circumstances.
- d) every reasonable effort should be made to secure the person’s co-operation and minimise embarrassment.
- e) a strip search should not consist of any physical contact with any body orifice.
- f) removal of any article from a body orifice other than the mouth constitutes an intimate search.
- g) a strip search should be conducted as quickly as possible, and the person searched allowed to dress as soon as the procedure is complete.

A custody officer who may effect a strip search must be independent of the investigation officer and his decision to carry out a strip search should be taken in good faith. Therefore, where a strip search is carried out devoid of reasonable grounds it becomes unlawful.⁷⁶

⁷⁴ Ibid, Annex AB 10.

⁷⁵ Ibid, Annex AB 11.

⁷⁶ See Bevan and Lidstone *supra*, n. 19 p. 397.

An intimate search is defined in section 65 of the Police and Criminal Evidence Act 1984 (as amended by section 59 (1) of the Criminal Justice and Public Order Act 1994), as “a search which consists of the physical examination of a person’s body orifices other than the mouth.” Body orifices may consist of anus, vagina, nostrils and ears.

An intimate search as it constitutes a gross infringement of the privacy of the person searched should only be undertaken in restricted cases and should be surrounded by specific safeguards. Therefore the 1984 Act and its accompanying Code provide some rules which govern all intimate searches.

The most important rules are:

- 1) An intimate search can only be carried out in the case where a person has been arrested and is in police detention.⁷⁷ This is unlike a strip search which could also be carried out in other cases (see above).
- 2) An intimate search cannot be undertaken unless it is authorised by an officer of at least superintendent rank who has reasonable grounds to believe that:
 - a) the detained person may have concealed articles which could be used to injure himself or others;⁷⁸ or
 - b) the detained person may have concealed class A drugs with the intention of supplying those drugs to others or of exporting them.⁷⁹ Thus a person who conceals such drugs only for personal use may not be subject to an intimate search. That means an intimate search for evidence other than that stated above cannot be authorised.
- 3) Before authorising an intimate search the high ranking officer must reasonably believe that the search is the only way by which a concealed article may be found.⁸⁰ Accordingly a person arrested must be told first to produce such articles and only on refusal may the police use their power to attain their object. The authorisation for an intimate search may be given orally or in

⁷⁷ The Police and Criminal Evidence Act 1984, section 55 (1)(a).

⁷⁸ Ibid.

⁷⁹ Ibid, s 55(1)(6).

⁸⁰ Ibid, s 55 (2).

writing, but where it is given orally it should be confirmed in writing as soon as practicable.⁸¹

It is obvious that the main factor without which an intimate search may not be take place is the belief of a senior officer that an arrested person may have concealed a prohibited article in his body orifices. The question which presents itself now is: What is the evidence which could lead the senior officer to hold such a belief? In fact such evidence must explicitly indicate that a person has drugs or weapons concealed. For example, a person's manner of walking may indicate that he has hidden an article in his rectum. A person who previously used his body orifices to conceal a drug, together with reliable information that he is in possession of drugs which have not been found by a superficial search, would raise reasonable grounds for an intimate search. Furthermore information from a credible witness might also constitute a reasonable ground for such belief. For example if an arrested person's girlfriend told the police that she assisted him by inserting drugs into his rectum.⁸²

The 1984 Act with regard to persons who may effect an intimate search and the place where it may be carried out distinguishes between a search for drugs and a search for weapons. In the former, the search should be carried out by a suitably qualified person⁸³ such as a registered medical practitioner or a registered nurse.⁸⁴ And it should take place at medical premises. In the latter case, however, the search can be performed by a constable in a case where an officer of at least superintendent rank considers that it is impracticable for it to be carried it out by someone else, for example, where a doctor is unavailable or he refuses to carry out the search.⁸⁵ Such a search usually takes place at a police station and the constable who effects it should be of the same sex as the person searched.⁸⁶

⁸¹ Ibid, s 55 (3).

⁸² See Bevan and Lidstone *supra*, n. 19 p. 401.

⁸³ The Police and Criminal Evidence Act 1984, section 55 (4).

⁸⁴ Ibid, s 55 (17).

⁸⁵ Ibid, s 55 (5)(6).

⁸⁶ Ibid, s 55 (7).

When an arrested person is searched this should be recorded in his custody record as soon as practicable⁸⁷ and it should include the parts of the body which were searched and the record must also state the person who carried out the search, who was present, the reason for the search and the result.⁸⁸

The custody officer may seize and retain anything which is found on an intimate search of a person, if he believes that it may be used to cause physical injury to himself or others, or damage to property, interfere with evidence, assist the person to escape, or if the officer has reasonable grounds for believing that the article may be evidence relating to an offence.⁸⁹

Search of premises

At common law and prior to the passing of the Police and Criminal Evidence Act 1984 searching an arrested person's house was a controversial issue. However the police were able search a person's house after they had arrested him.⁹⁰

The following judicial decisions illustrate the attitude of the common law with regard to the police power to search an arrested person's house. In *Jeffrey v Black*⁹¹ the respondent was arrested for the theft of a sandwich. The police searched his house and found drugs and he was charged with unlawful possession of drugs.

Lord Widgery CJ when considering the right of the police to enter and search the house of the respondent, referred to the passage in Lord Denning MR's judgment in *Ghani v Jones* which states:

I would start by considering the law where police officers enter a man's house by virtue of a warrant, or arrest a man lawfully, with or without a warrant, for a serious offence. I take it to be settled law, without citing cases, that the officers are entitled to take any goods which they find in his possession or in his house

⁸⁷ Ibid, s 55 (10),(11).

⁸⁸ Code C Annex A 7.

⁸⁹ The Police and Criminal Evidence Act 1984, section 55 (12).

⁹⁰ See Zander. M., *supra*, n. 11 p. 126

⁹¹ *Jeffrey v Black* [1978] 1 All ER 555.

which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter.

Lord Widgery CJ concluded that the search might have been lawful if the police had been looking for evidence relating to the theft of the stolen sandwich. In opposition to the above case Lord Justice Donaldson in *McLorie v Oxford*⁹² disapproved the dictum of Lord Chief Justice Widgery. In this case the defendant was the brother of a motorist who was involved in a serious incident. The motorist was arrested at the house where he lived with his father and the defendant, and was charged with attempted murder in circumstances in which the car was used as the weapon. The next day the police saw the car in the yard at the rear of the house. They went to the house in order to remove the car for examination but the defendant refused to allow them to take the car without a warrant. But they entered the house without permission and the defendant tried to resist their entry. He was charged with assaulting a constable, and with obstructing a constable in the execution of his duty. But the Divisional Court quashed the conviction on the grounds that the police were not acting in the execution of their duty in entering private property to obtain material evidence of a serious crime that was being withheld from them. Lord Justice Donaldson stated that:

We have no doubt that the constables could have entered 141, Alder Street without a warrant and despite objection by the occupier if, but only if, they had followed the driver to that address, i.e., if it was a "hot pursuit" case. In such circumstances they could also have seized and removed the car which, on this hypothesis, would still have been in the possession of the driver. Furthermore, if, as might well have been the case, they had good reason to postpone removing the car—for example they might have wished to fit a ring to the steering wheel in order to preserve finger prints and have had no ring available or they might have been unable to spare a constable to remove it immediately—they would have been entitled to tell the householder that they were seizing the car and would return as soon as possible to remove it. If they had then returned and were refused entry, they would have been entitled to use such force as was necessary in order to re-enter.

But that is not this case. When the police officers left 141, Alder Street, presumably they did not know that the car was there. In all probability it was not there. The fact that that was its location when it was later found is in a

⁹² *McLorie v Oxford* [1982] 3 W.L.R. 423.

sense coincidental and certainly irrelevant. It might have been found almost anywhere-in a repair garage, for example.

Such is the importance attached by the common law to the relative inviolability of a dwelling house that we cannot believe that there is a common law right without warrant to enter one either in order to search for instruments of crime, even of serious crime, or in order to seize such an instrument which is known to be there. Certainly if there were, we would expect it to be reflected in the books and it is not. There is no right of search and/or seizure of material from the scene of an arrest after that arrest has been completed. However a timely seizure may allow a postponed removal if the postponement is as short as possible.

That was the situation before the passing of the Police and Criminal Evidence Act 1984. The 1984 Act in general adopted the view which was held in *Jeffrey v Black* and it reversed the opposed decision in *McLorie v Oxford*.

In addition the 1984 Act provides two types of searching, namely:

- 1) the search of an arrested person's premises which are occupied or controlled by him.
- 2) the search of a person's premises in which he was when arrested or immediately before he was arrested.

Section 18 of the 1984 Act ⁹³ grants a constable the power to enter and search "any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates a) to the offence; or b) to some other arrestable offence which is connected with or similar to that offence".

It is apparent from the provision of section 18 that the arrest has taken place away from an arrested person's premises and the police need to enter and search premises occupied by him. The police before exercising their power to search the arrested person's premises under this section must be sure of the existence of three elements:

1. The offence for which the person is arrested should be an arrestable offence, as the power to search an arrested person's premises is only open to the police where the offence is arrestable.

⁹³ The Police and Criminal Evidence Act 1984, section 18

2. Premises subject to the search must be occupied or controlled by the arrested person. There is no place for reasonable belief regarding this matter, either the premises are ‘occupied or controlled’ by the arrested person or they are not. And the police must confirm this for example, by documentary evidence or by asking neighbours. Neither the 1984 Act nor the Code of Practice provides a definition for “controlled”. But it obviously differs from normal occupation. It could cover the situation where a person has a legal title over the premises such as a landlord of a guest house or a block of flats.⁹⁴
3. A constable must have reasonable grounds for suspecting that there is on the premises evidence (other than items subject to legal privilege)⁹⁵ that relates to the offence in question or an offence connected with or similar to it.⁹⁶ The grounds upon which a constable may base his belief are a question of fact in every case.⁹⁷

Section 32⁹⁸ entitles the police to enter and search an arrested person’s premises in which he was when arrested, or immediately before he was arrested, for evidence relating to the offence for which he was arrested.

The power granted to the police to enter and search an arrested person’s premises under section 32 (2)(b) differs from the power provided under section 18 in three respects:

1. The power to search a person’s premises under s.32 (2)(b) is open to the police for all offences, while under s. 18 such power is confined to arrestable offences.
2. Section 32 gives the police the power to search an arrested person’s premises in which he was when arrested, or immediately before he was arrested. Section 18 gives such power only where the person is arrested away from his house,

⁹⁴ See Bevan and Lidstone *supra*, n. 19 p. 116.

⁹⁵ For the meaning of the “items subject to legal privilege” see section 10 of the Police and Criminal Evidence Act 1984.

⁹⁶ For example, robbery, burglary and obtaining articles by deception are similar to theft.

⁹⁷ *R v Beckford* [1990] Crim LR 833.

⁹⁸ The Police and Criminal Evidence Act 1984, section 32.

whether at a police station or another place, as long as the premises in question are occupied or controlled by him.

3. The power to search under s. 32 is an immediate power, which should be exercised at the time of the arrest. This is unlike the power under s. 18 where a constable could exercise it some time after the arrest and more than once regarding the same premises.⁹⁹

Scottish Law

Under Scottish law the police not only have powers to search an arrested person but they also have such powers to search a detainee. Therefore we will discuss first powers of the police to search an arrested person and his premises and then their powers to search a detainee.

Search following arrest

Search of persons

The general principle at common law is that the police have a right to search a person whom they have lawfully arrested with or without a warrant. And it is common for the police when they arrest on a summary warrant to search the arrestee even if the arrest warrant includes no power of search.¹⁰⁰ The object of searching an arrested person is to provide the police with evidence to support their suspicion, but not to find evidence to determine whether to arrest a person or not. In *Jackson v Stevenson*¹⁰¹ two bailiffs saw the appellant (Jackson) fishing and they suspected he was fishing illegally. They searched him in order to find implements for illegal fishing in his possession. He resisted the search and was convicted of resisting the bailiffs in the execution of their duties, contrary to

⁹⁹ See Bevan and Lidstone *supra*, n. 19 p. 116.

¹⁰⁰ Renton and Brown *Criminal Procedure according to the law of Scotland* (6th edn) para 7-21.

¹⁰¹ *Jackson v Stevenson* (1897) 4 S.L.T. 277.

section 39 of the Tweed Fishing Act 1857. He appealed against the conviction. Lord Justice General Robertson upheld the appeal. He said:

As I read the case, they did not apprehend him, and had not resolved to apprehend him, until the result of their search confirmed their previous suspicions. If this were so, then I do not think that they were within their powers, and therefore I could not hold them to have been in the execution of the Acts when the appellant resisted them.

The right of the bailiffs, be it observed, is to exercise the powers and authorities of constables in the same manner as if the statutory offences were breaches of the peace. Now, a constable is entitled to arrest, without a warrant, any person seen by him committing a breach of the peace, and he may arrest on the direct information of eye witnesses. Having arrested him, I make no doubt that the constable could search him. But it is a totally different matter to search a man in order to find evidence to determine whether you will apprehend him or not. If the search succeeds (such is the condition of the argument), you will apprehend him; but if the search does not succeed, you will not apprehend him. Now, I have only to say that I know no authority for ascribing to constables the right to make such tentative searches, and they seem contrary to constitutional principle. If the constable requires to make such a search, it can only be because without it he is not justified in apprehending; and, without a warrant, to search a person not liable to apprehension seems palpably illegal.

The police are entitled to search an arrested person whom they are intending to place in a cell. But they should consider that such a search must be necessary in the light of the surrounding circumstances and the particularity of each case. In *Henderson v Chief Constable, Fife Police*¹⁰² the pursuer (Henderson) and five other men and six women were arrested for an offence under the Trespass (Scotland) Act 1865, and taken to a police station. Before being placed in the police cell the male arrestees were asked by the police to remove certain articles of clothing and the female arrestees were asked to remove their brassieres. The pursuer sought damages for wrongful arrest and detention and for having to remove her brassiere. The court held that the arrest and detention were not unreasonable and unnecessary but that the removal of the brassiere was an infringement of liberty and privacy and was not justified.

Lord Jauncey ruled that:

¹⁰² *Henderson v. Chief Constable, Fife Police (O.H.)* 1988 S.L.T. 361.

She was asked to remove this article of clothing before entering the cell in a manner which suggested that she was expected to comply with the request. She did so. There was a good deal of discussion with the police witnesses about certain circulars issued by the Scottish Home and Health Department dealing with the removal of clothing from persons about to be detained in cells. I do not consider that the precise terms of these circulars, nor which circular was current in September 1982 are relevant to this case. It was clear that the invitation to Mrs Henderson to remove her brassiere was given as matter of course to all female detainees in Fife at the time. The justification advanced for this practice was that it prevented the detainee doing harm to himself or to any police officer who might enter the cell. Since the removal against her will of an undergarment from a woman must constitute an invasion of her liberty, I must therefore consider whether Mrs Henderson has demonstrated that such invasion was in the circumstances unjustified. The mere fact the police officer concerned were acting in accordance with normal practice would not necessarily mean that that they did was justifiable in law if the particular circumstances did not require what normal practice be followed.

Search of an arrested person may include a physical examination, taking fingerprints, palmprints, palm rubbings, nail scraping and bite marks etc.¹⁰³

These prints may be taken several times while the arrestee is still in police custody; however, they must be related to the offence for which he has been arrested. This is what was held in *Namyslak v H.M Advocate*.¹⁰⁴ The Lord Justice General (Hope) stated:

We accept the Crown proposition that if a person is under arrest but not yet fully committed, it is still open to the police to carry out their investigations and that, if these involve fingerprinting, they may at this stage fingerprint the person who is in their custody on any number of occasions. But in his discussion of this matter in *Adair v McGarry* Lord Justice-General Clyde makes it clear that the fingerprinting which may be carried out at this stage is with a view to connecting the person with the crime for which he had been [arrested] or identifying him with the criminal who perpetrated that crime.

In addition to their power to search an arrested person under common law, the police are granted a specific power to search such person by section 18 of the Criminal Procedure (Scotland) Act 1995. A constable may take from the arrested person fingerprints, palm prints and such other prints and impressions of an external part of the body as the constable may, having regard to the

¹⁰³ Renton and Brown *supra*, n. 100 para 7-21.

¹⁰⁴ *Namyslak v H.M Advocate* 1994 S.C.C.R. 140.

circumstances of the suspected offence in respect of which the person has been arrested or detained, reasonably consider it appropriate to take.¹⁰⁵

A constable may, with the authority of an officer of a rank no lower than inspector, take from the person:¹⁰⁶

- a) from the hair of an external part of the body other than pubic hair, by means of cutting, combing or plucking, a sample of hair or other material;
- b) from a fingernail or toenail or from under any such nail, a sample of nail or other material;
- c) from an external part of the body, by means of swabbing or rubbing, a sample of blood or other body fluid, of body tissue or of other material;
- d) from the inside of the mouth, by means of swabbing, a sample of saliva or other material. The constable may use reasonable force in exercising the above powers.¹⁰⁷

Search of premises

In respect of search of premises the police have approximately the same powers which they have regarding the search of persons. Warrant to arrest usually includes warrant to search the person's premises for evidence. When the police are arresting a person in his house with or without a warrant they are probably entitled to search that house for stolen property or any evidential material.¹⁰⁸

Even on irregular search of the premises of an arrested person could be justified in the light of the circumstances of the case.¹⁰⁹ Existence of a state of urgency, the degree of invasion of the privacy of the person and the good faith of the searcher, are all factors which would be considered by the trial judge in deciding whether to admit any evidence which resulted from such search.¹¹⁰

¹⁰⁵ The Criminal Procedure (Scotland) Act 1995 s. 18 (2).

¹⁰⁶ Ibid, s. 18 (6).

¹⁰⁷ Ibid, s. 18 (7).

¹⁰⁸ Renton and Brown *supra*, n. 100 para 7. 26.

¹⁰⁹ See J.T.C., *Evidence Obtained by Means Considered Irregular* 1969 J.R. 55.

¹¹⁰ Ibid; *Edgley v Barbour* 1994 S.C.C.R. 789; *Laverie v Murray* 1964 S.L.T. (Notes) 3.

In *Edgley v Barbour*¹¹¹ the police observed the appellant's car speeding at about midnight and while they drove alongside the car, they saw what they thought was a radar-detection device on its dashboard. They activated it with their radar gun from the police car. Then they stopped the car but the device was no longer on the dashboard, but the police did see two Velcro strips where it had been on the dashboard and the cigarette lighter socket was empty. The appellant was asked to hand over the device but he denied having any such device. He was told that he could be arrested for obstruction; he asked the police to do so in order to go to the police station. One of the constables (Masterton) opened the passenger door of the car and opened the glove compartment from which he retrieved the device. At the trial objection was taken to evidence being led of the finding of the device on the ground that it had been obtained by illegal search. But the sheriff held that the search was the result of a conscious decision by the constable in good faith, which was excusable on the ground of urgency. The appellant appealed to the High Court. The Lord Justice- General (Hope) held that:

We are not persuaded that the sheriff misdirected himself in this case in holding that the evidence of the finding of the device in the appellant's motor-car was admissible. He has found as a fact that constable Masterton took the action which he did as a result of a conscious decision having considered the alternatives which were available. There is no indication here that constable Masterton was acting in bad faith. Furthermore the circumstances as described in finding 17 were such that it would clearly have been impracticable for the officers to have obtained a search warrant within the time necessary to avoid giving the appellant the opportunity of disposing of the evidence. The officers would no doubt have been entitled to search the appellant's person if they had arrested him for obstruction. But it would still have been necessary for them to justify their search of the motor-car, since the purpose of the search was to find evidence in it that the appellant had been using a radar detection device illegally.

There is ample authority to support the sheriff's view that the police officers were entitled to act as they did because the situation was one of such urgency that action had to be taken then to prevent the appellant from disposing of the device and that, in any event, the interests of the public outweighed the relatively minor interruption of the appellant's privacy.

¹¹¹ *Edgley v Barbour* supra.

Search following detention

Section 14 of the Criminal Procedure (Scotland) Act 1995 gives the police the same powers to search a detained person as are available on arrest, and to exercise reasonable force to effect such search.¹¹² Therefore, a detained person is subject to the same types of search as an arrested person, as mentioned above.

A person may be detained under section 26 of the Criminal Law (Consolidation) (Scotland) Act 1995 which deals with detention and search by customs officers in cases where a person is suspected of importing, exporting, processing, or dealing with prohibited drugs, contrary to section 50, 68 or 170 of the Customs and Excise Management Act 1970, or where the offence involves a controlled drug.¹¹³ A customs officer may detain a person whom he suspects on reasonable grounds has committed or is committing any of these offences and has a controlled drug secreted in his body in connection with the commission of such an offence. A customs officer of the grade of senior executive officer or above may authorise that person's detention at a customs office or elsewhere, whether that person has been or is being detained under some other statutory provision.¹¹⁴

A person detained under section 26 is required to provide specimens of blood or urine for analysis, and to submit to intimate search (i.e. physical examination of his body orifices) by a doctor, and to other tests as may be prescribed by the Secretary of State to be carried out by or under the supervision of a doctor, as the customs officer may reasonably require.¹¹⁵ A person may only be required to provide blood or submit to the above searches or examinations if a doctor decides that there are no medical reasons for not making the requirement, and a blood test should be carried out only by a doctor.¹¹⁶

¹¹² The Criminal Procedure (Scotland) Act 1995 s. 14 (7) (b), (8).

¹¹³ The Criminal Law (Consolidation) (Scotland) Act 1995 s. 26 (11).

¹¹⁴ *Ibid*, s. 26 (1) and (11).

¹¹⁵ *Ibid*, s. 26 (2).

¹¹⁶ *Ibid*, s. 26 (7).

Section (3) Use of force to effect arrest

The police in order to be able to enforce the law should be entitled to use force, particularly where they are exercising a procedure which deprives persons of their freedom such as arrest. Therefore criminal laws usually contain provisions which entitle the police to use force to effect arrest. However, how much force and in what circumstance it may be used may differ from one system to another. This section on the one hand deals with the use of force to effect arrest and on the other hand it presents the right of persons to resist arrest.

Egyptian Law

In executing his power to effect arrest a police officer is entitled to use reasonable force. The officer should however not exceed the force which is reasonably necessary to carry out his duty in arresting persons. Whether the force used by the officer to effect arrest is reasonable or not, is subject to the assessment of the prosecution and the competent court.¹¹⁷

The Police Organization Code provides that a policeman in order to exercise his duty is entitled to use such force as is necessary where such force is the only way by which the duty can be achieved.¹¹⁸ From this it is clear that a police officer has no power to use force to effect arrest if a person subject to arrest shows no resistance and seems cooperative.¹¹⁹

Under Egyptian law a police officer in exercising his power to arrest may restrain an arrested person by holding his arm or twisting his hand behind his back. And he may also use handcuffs or even use a firearm in a particular case.

¹¹⁷ Husni. M.N., *supra*, n. 27 p. 61.

¹¹⁸ The Police Organization Code, No. 109 (1971), art. 102.

¹¹⁹ Bahnam. R., *Al- Nadhari `ya Al-Ammah Lil Qanun Al-Jina`i Al-Juz` Al-awwal* (Arabic) (The General Theory of Criminal Law, part 1(1st edn 1971) p. 413.

The Police Organization Code states the situations in which a police officer may use a firearm as follows:¹²⁰

- a) in arresting any person who has been convicted and sentenced to a criminal penalty or to imprisonment of three months if he shows resistance or attempts to escape.
- b) in arresting any person accused of felony, or in the act of arrestable misdemeanour, or in respect of whom an arrest warrant has been issued, who shows resistance by attempt to escape.

The use of firearms must be restricted to stations where it is the sole means available to attain the above objects. The police officer before using the firearm should first warn the subject that he will shoot then start by shooting into the air, and then he may shoot at a non-deadly part of the subject's body such as the subject's leg.¹²¹ The question which presents itself is what the situation will be if the person dies as a result of the shooting.

In order to answer this question we should distinguish between three possibilities.

- 1) that the officer intended to kill the person when he was shooting him. The officer will be liable for murder if such an intention is proven.
- 2) where there was no such intention from the officer the question arises whether there was negligence on his part in shooting the victim in a deadly part of his body. If any negligence by the officer is proven, he is in this case liable for manslaughter.
- 3) where neither intention nor negligence is proven and the officer spared no effort to avoid causing any deadly effect upon the person; for example at the time of the shooting the victim suddenly fell down which caused him to be hit in a vital area. In this case there is no basis for the officer to be held responsible since the absence of intention to kill and negligence indicates no legal responsibility.¹²²

¹²⁰ The Police Organization Code, No. 109 (1971), art. 102.

¹²¹ Ibid.

¹²² Husni. M.N., *supra*, n. 27 pp. 63-64.

Persons have no right to resist a lawful arrest and it cannot be said such resistance if engaged in is a form of self-defence. Although the Egyptian law identifies the right of self-defence it however restricts it by applying specific conditions.¹²³ One of these conditions is that the act of self-defence should be directed to prevent an illegal act or in other words an assault. Thus in the case of lawful arrest there is no place for self-defence, since such an arrest does not constitute an assault.¹²⁴ Moreover, a person who resists lawful arrest may be liable for the offence of resisting a public servant while or because of performing duties in the course of his office.¹²⁵

It is worth noting that where the arresting person is a plain-clothes officer, a person subject to arrest has the right to ask him to prove his identity, for example to produce his ID card. If the officer refuses the person's request the latter has the right to resist the officer if he attempts to arrest him, and the person in such a case is not liable for the offence of resisting a public servant while or because of performing duties in the course of his office. The reason for that is that the offence is one of the those which requires the existence of *mens rea*. And one of the elements of the *mens rea* in the offence of 'resistance of a public servant while in the exercise of his duty' is the person's knowledge that the officer is in fact exercising his duty. This element does not exist in the case where the officer refuses to identify himself to the person.¹²⁶

A person unlawfully arrested under Egyptian law still has no right to resist such arrest where the arrestor is a police officer, except in a few cases. This can be inferred from Article 248 of the Egyptian Penal Law 1937 Act which does not admit the use of the right of self-defence in resisting an official officer when exercising his duty in good faith, even where the officer exceeds his power, unless it is feared that his acts may cause death or serious wounds, and that there is a reasonable ground for such apprehension. According to Article 248 a person

¹²³ See Articles 245-251 of the Egyptian Penal Act 1937.

¹²⁴ Husni.M.N., *supra*, n. 27 p. 56.

¹²⁵ Articles 136-137 (repeated) of the Egyptian Penal Act 1937.

¹²⁶ See in general Husni.M.N., *supra*, n. 27 pp. 57-58.

unlawfully arrested by a police officer or any other official officer can resist the arrest in two cases. First, where the officer is exercising his powers in bad faith. For example, where he is aware that the arrest warrant which he relies on in executing arrest is invalid. Second, where there is a reasonable ground for fear that the officer's acts may cause death of or serious wounds to the person concerned. For example, where the person subject to arrest is seriously ill and any attempt to move him from his place may cause his death.¹²⁷

It is clear that Article 248 is relevant only where the arrestor is an official officer. From this it could be said that a person unlawfully arrested by an ordinary person has the right to resist such an arrest under his right of self-defence.

The UAE Law

The UAE law regarding the use of force to effect arrest is somewhat similar to Egyptian law. The police may use reasonable force to execute arrest if it is necessary.¹²⁸ They may hold the person's hand or twist it behind his back and they may if necessary use handcuffs.

When using force the police should not exceed the limit which is necessary to effect arrest, and this is subject to the circumstances of each case. The police when exercising their powers, whether in effecting arrest or in any other conduct, may be liable for the offence of 'use of harassment'. Article 245 of the UAE Penal Procedure Act 1992 provides that a prison sentence of not less than one year and a fine of not less than ten thousand Dirhams, or both, should be passed against any public office holder or person in charge of a public service who causes harassment to people, offends their sense of decency, or causes bodily pain to them by exploiting the power of his office. In one of its decisions the

¹²⁷ Ibid, p. 59; Ramadan. O.S., *Sharh Qanun Al-Oquobat Al-Quism Al-Aam* (Arabic) (Explanation of Penal Law- General Part) 1990/1991, p. 492; Srour. A.F., *Qanun Al-Oquobat* (Arabic) (Penal Law) 5th edn 1991 p. 221.

¹²⁸ Abu-Katwah. A.S., *Qamun Al-Oquobat Li Dowlat Al-Imarat Al-Arabiyah Al-Mutahidah Al-Zuz 'Al-Awwal* (Arabic) (The UAE Criminal Penal Law, part 1) p. 233.

Dubai Cassation Court ¹²⁹ upheld the conviction of the Appeal Court against police officers who had been charged with an offence of “use of harassment”. The facts of the case may be summarized in that the public prosecution issued a search warrant to the police to search the house of a particular person whom the police suspected of having committed an offence of facilitating practising of prostitution. Six police members went to the building where the suspect was supposed to be staying according to their investigation. They rang the door bell and as soon as the plaintiff opened the door they broke into the flat without introducing themselves to him, and worse they assaulted him and his son, who tried to defend his father. They did that under the mistaken belief that the plaintiff was the suspect.

The six officers were charged with the use of harassment contrary to Article 245 and the plaintiff brought an action of damages against them. At trial the court of first instance acquitted the police officers and dismissed the action of damages. Both the public prosecution and the plaintiff appealed to the Appeal Court. The Appeal Court quashed the first court judgment and convicted all the officers and sentenced each of them to an imprisonment of one month, and obliged them to pay damages of 50,000 Dirhams.

A person lawfully arrested has no right to resist the arrest. And it cannot be said that he may use his right of self-defence in resisting arrest. That is because the right of self-defence requires the same specific conditions as have been stated above in relation to Egyptian law.

On the other hand a person unlawfully arrested can resist the arrest relying on his right to self-defence where such arrest is carried out by a private citizen. But where it is carried out by a police officer the arrested person cannot rely on self-defence in resisting such an arrest except in one specific case. Article 58 of the UAE Penal Law Act 1987 provides that the right of self-defence does not legalize resistance against any of the members of public authority while carrying out their duty within the course of their employment, unless it is feared that such

¹²⁹ The Dubai Cassation Court, cassation No.124/1996.

an act may cause death or serious wounds, and there is reasonable grounds for such apprehension.

This Article is similar to Article 248 of the Egyptian Penal Law 1937 Act. The UAE law, however, does not state that the right of self-defence is recognised where the member of public authority exceeds his power in bad faith. Therefore a person unlawfully arrested by a police officer has no right to resist the arrest unless there are reasonable grounds for his fear that the arrest may cause death or serious injury.

English Law

The use of reasonable force is permitted under English law, whether in order to effect arrest or to enforce the law in general. Section 3 of the Criminal Law Act 1967 provides that “A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.”

It is clear from the provision of section 3 that the use of force is permitted to achieve two objects: to prevent crimes and to effect arrest. And the use of force in these cases is permitted to anyone, even a private citizen.

Section 117 of the Police and Criminal Evidence Act 1984 provides that “where any provision of this Act-

- (a) confers a power on a constable; and
- (b) does not provide that the power may only be exercised with the consent of some person, other than a police officer, the officer may use reasonable force, if necessary, in the exercise of the power.”

The power to use force under section 117 is general since it is granted to a constable when exercising any power provided by the PACE Act unless the use of force by the constable depends on the consent of some person. Therefore a constable when arresting a person under any provision of the PACE Act may use reasonable force to effect that arrest.

It seems that whatever the reason for the use of force is, whether it is to effect arrest or to carry out any other lawful conduct under the law, the force used should be reasonable and the person who exercises it should take care that the use of force does not exceed the level which is needed in the circumstances; otherwise he may be liable for damages or even for criminal prosecution. In *Sturley v. Police*¹³⁰ a policewoman when effecting arrest against a middle-age lady in order to restrain her put the lady's left arm behind her back by twisting the wrist, which led to it breaking. The policewoman did this in the presence of another constable.

The court held that:

it was not a proper form of restraint in the circumstances. Two police officers should be able to control a middle-age woman by holding her hands down by her sides; one officer on her own could restrain such a person by means of a hammer-lock and bar.

The court considered the conduct of the police officer an assault and stated that the lady was entitled to damages of £2,000.

It is clear now that the arrester can use reasonable force when effecting arrest, and that such force depends on the circumstances surrounding each case. The question which presents itself now is whether the use of excessive force in effecting arrest renders it unlawful. This question has been answered by *Simpson v. Chief Constable of South Yorkshire Police*.¹³¹ In this case the plaintiff was charged with and convicted of maliciously wounding one officer during arrest, and of threatening behaviour. The plaintiff alleged that the officers assaulted him during arrest and that made the arrest unlawful. Fox L J said:

The circumstances of many arrests were such that errors of judgment might be made. If the arrest was itself justified in law, such errors in the mode of conducting it, although they might be the basis for other remedies, did not seem to be a good basis for invalidating the arrest itself which was necessary in the public interest.

¹³⁰ *Sturley v. Police Comr* (1984) Times, 27 June.

¹³¹ *Simpson v. Chief Constable of South Yorkshire Police* (1991) 135 Sol Jo 383, CA.

Whether the mistaken belief of a person that the use of reasonable force is justified makes him subject to liability depends on the nature of such a mistake, namely, whether it was a mistake of fact or a mistake of law.¹³² In the case of a mistake of fact a person may be free from any responsibility if his mistaken belief was genuine and objectively reasonable.

In *R v. Williams*¹³³ M saw a youth attempting to rob a woman in the street. He arrested the youth and attempted to immobilise him. The appellant saw only the latter stage, M arresting the youth and the youth shouting for help. M, in justifying his conduct, said to the appellant that he was a policeman, which was untrue, and that he was arresting the youth. The appellant asked M for his warrant card which he failed to produce. The appellant punched M in the face. He was charged with assault causing actual bodily harm. At his trial his defence was that he had honestly believed that the youth was being unlawfully assaulted by M and that it was irrelevant whether his mistake was reasonable or unreasonable. The judge directed the jury that the appellant had to have an honest belief based on reasonable grounds that M was acting unlawfully. The appellant was convicted and he appealed on the ground that the judge had misdirected the jury.

Lord Lane CJ stated that:

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted.

The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been labouring under a mistake as to the facts he

¹³² See Bevan and Lidston *supra*, n. 19 p. 308.

¹³³ *R v. Williams* [1987] 3 All ER 411.

must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not.

With regard to a mistake regarding the law the matter is different. Such a mistake does not unburden the person from responsibility. This is what may be elicited from the decision of *Kerr v. DPP*.¹³⁴ A police constable, mistakenly believing the appellant to have been arrested by a colleague, took hold of her arm in order to detain her. As he was cautioning her she punched him. The appellant was charged with and convicted of assaulting a police officer in the execution of his duty. The appellant argued that the police constable was not acting in the execution of his duty because he was unlawfully detaining her when she had not in fact been arrested. The Divisional Court allowed the appeal and quashed the conviction. It considered the argument of the appellant as a point of law and answerable in favour of the appellant. It stated that there was no doubt that the police constable was exceeding his powers.

From the decision of the above cases it could be concluded that the mistaken belief by a person that the use of force to effect arrest is reasonably justified does not free him from liability unless he honestly holds such a belief and such a mistake, viewed objectively, is reasonable.

In general an arrested person has no right to use force to resist arrest, particularly where such an arrest is carried out by the police.¹³⁵ However, it is necessary to distinguish between the situation where the arrest is lawful and where it is unlawful. In the first situation the use of force to resist arrest is not allowed and a person who uses such force may face a charge of assault with intent to resist lawful arrest under section 18 or section 38 of the Offences Against the Person Act 1861; or a charge of assaulting or obstructing a constable in the execution of his duty under section 51 of the Police Act 1964. The use of force to resist lawful arrest is still not allowed even if the person who is exercising such force honestly and reasonably believed that the arrest was

¹³⁴ *Kerr v. DPP* [1994] Crim LR 394.

¹³⁵ Bevan and Lidston *supra*, n. 19 p. 311.

unlawful. In *R v. Fennell*¹³⁶ the appellant was charged with assaulting a police constable in the execution of his duty, contrary to section 51 of the Police Act 1964. A fight had broken out outside a public house amongst between 30 to 40 youths in which the appellant's son had become involved. The appellant's son was arrested for violent behaviour. The appellant asked a police sergeant who was present to release his son as he had done no wrong, and, according to the sergeant, he replied that the son had been arrested and would have to be taken to a police station whereas, according to the appellant, the sergeant told him to take his son home. The appellant told one of the officers that he would hit him if his son was not released, and, as the officer did not respond, the appellant hit him a deliberate blow on the jaw. The appellant was convicted and he appealed to the Court of Appeal.

At the appeal Widgery LJ said:

It was accepted in the court below that, if the arrest had been, in fact, unlawful, the appellant would have been justified in using reasonable force to secure the release of his son. This proposition has not been argued before us and we will assume without deciding it, that it is correct. Counsel for the appellant referred us to a number of authorities concerned with the use of force in self-defence, and pointed out that a sufficient justification was there established if the accused genuinely believed on reasonable grounds that a relative or friend was in imminent danger of injury, even though that belief was based on an honest mistake of fact: *R v Chisam*. Counsel then contended that, by a parity of reasoning, a father who used force to effect the release of his son from custody was justified in so doing if he honestly believed on reasonable grounds that (contrary to the fact) the arrest was unlawful. We do not accept that submission. The law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact. On the other hand, if the child is in police custody and not in imminent danger of injury, there is no urgency of the kind which requires an immediate decision, and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified.

From the quoted decision it could be stated that a person cannot use force to resist lawful arrest even when he has reasonable belief that the arrest was

¹³⁶ *R v. Fennell* [1970] 3 All ER 215.

unlawful. However, if the reasonable belief of the person, that the arrest was unlawful, resulted from a mistake of fact and the object of the resistance was to prevent an incidence of imminent danger of injury to him or to others, such a belief may be accepted in his defence.

The situation is different where the arrest is unlawful since the arrestee has the right to resist such arrest and that is not considered an offence under the Offence Against the Person Act 1861 nor an offence of assaulting or obstructing a constable in the execution of his duty under the Police Act 1964.¹³⁷ The legality of resistance to an unlawful arrest derives from the right of a person to use reasonable force to defend himself from an unlawful act, whether such an act is conducted by an ordinary person or by a police constable. That is what may be elicited from the decisions of *Kerr v. DPP* above.

It is worth noting that in spite of the fact that a person has the right to use force in resisting unlawful arrest, such force should be reasonable and not excessive. "A person may use such force as is (objectively) reasonable in the circumstances as he (objectively) believes them to be".¹³⁸ If he uses excessive force he may be charged with assault.¹³⁹

Scottish Law

Scottish law regarding the use of force to effect arrest is close to English law. A constable may use reasonable force when arresting a person. On the other hand, however, a constable may be liable in damages to a person in respect of whom he exceeded his power and used unreasonable force in effecting arrest. The following two cases illustrate the approach of Scottish courts in respect of the use of force to effect arrest.

¹³⁷ Bevan and Lidston Supra, n. 19 p. 311.

¹³⁸ *R v. Owino* [1995] Crim LR 743; *R v. Scarlett* [1993] 4 All ER 629.

¹³⁹ *R v. Ball* [1989] Crim LR 579.

In *Hill v. Campbell and another*¹⁴⁰ the pursuer in his action of damages against the police alleged, *inter alia*, that he was violently seized by two police constables and subjected to gross and unnecessary violence. Lord President said:

I have no doubt whatever that a police constable is not to be allowed, in excess of his duty, to take advantage of his position and brutally assault a person who is rightly in his custody. But that class of case would never be allowed to proceed unless there were very distinct averments to that effect. The averment here, although to a certain extent an averment of unnecessary violence, is really not sufficient to found a case of that class. The pursuer says he was held by the wrists and his arms were twisted, but these appear to me to be the ordinary circumstances of nearly every arrest, and I confess that the idea seems to me to be ridiculous that every pickpocket who is hauled along the street, by averring that the policeman twisted his arms a little further round than he need have done, should have as a matter of right an action of damages and a jury trial, in which twelve jurymen would be called upon to determine the precise angle of distortion at which the arms ought to be in taking a struggling man along a street. If, on the other hand, really serious violence is specifically averred, then that would be a case for allowing an issue. But, as I have said, I think there are no such averments here, and on the grounds that I have stated I am for refusing all the issues.

The decision in *M'Gilvray v. Bernfield*¹⁴¹ was in favour of the pursuer who sued the police for damages. The pursuer was a woman who alleged that two constables when arresting her seized hold of her in the presence of her neighbours and a large number of people, and dragged her out of the house without allowing her to put on her hat or jacket as she had asked them. The pursuer averred that she showed no resistance and said to the constables that she would go quietly with them if they would release their hold of her, but they ignored her request.

Lord Justice-Clerk Macdonald said:

The pursuer makes a distinct averment on record of a wrongful act in which unnecessary violence was used to-wards her by the police constables. The wrongfulness of the act consists in what they did. It is said on behalf of the defenders that the language must be assumed to be exaggerated. I do not think we are entitled to assume that. In the meantime we must take the statement that a law-abiding citizen was not allowed to put on decent apparel, but was seized and dragged through the streets. If that were done, she being willing to go peaceably, it is impossible to consider it as otherwise than wrongful. It was said it would be very hard on the police if charges of this kind were made against

¹⁴⁰ *Hill v. Campbell and another* (1905) 8F 220 at 224, 225.

¹⁴¹ *M'Gilvray v. Bernfield* (1901) 3F 397 at 399, 400.

them when there was no ground for them. I can only say that it is hard on any citizen to have a charge made against him which cannot be justified. Charges are often made by the police themselves which in the ultimate inquiry cannot be justified. I can see no reason for protecting the police more than any other citizen from inquiry where distinct averments of excess are made.

In addition Lord Trayner said:

I quite agree that we should not do anything which would hamper the police in the performance of their duty, but care must also be taken that the police in the performance of their duty do nothing that is wrongful or tyrannical. In the present case what is averred is that the policemen called at the pursuer's house, charged her with a criminal offence, and desired her to go with them to the police office; that before she could dress herself to go out with decency, they seized hold of her and dragged her with unnecessary violence to the police office. If that statement is true, then the policemen exceeded their duty.

From the above two decisions it could be said that the police are entitled to use force to effect arrest, but such force should be reasonable and justifiable in the light of the circumstances of each case. Further, persons under arrest must not be harshly treated by use of greater force than is necessary to restrain any resistance from them.¹⁴² For example, using handcuffs in arresting a person who shows no resistance and no attempt to abscond is unjustified conduct on the part of the police and may subject them to damages.¹⁴³

Where an arrest is unlawful persons have the right to resist it and that cannot be considered an obstruction of the police in execution of their duty. In *Twycross v. Farrell*¹⁴⁴ the appellant was arrested by a police constable on the grounds that he had received a message from the headmaster of a local school that he just seen a young man and thought that he was the suspected young man who had previously sold a pornographic magazine in the district. The appellant attempted to run away when the constable asked him to give his name and address. He further swore at the constable, which led to his arrest. The appellant resisted arrest by struggling and shouting. He was convicted of resisting, obstructing,

¹⁴² Scottish Criminal Law Police Duties and Procedure (16th edn 1996) Section 3 (Police Powers) p.4.

¹⁴³ *Henderson v. Chief Constable Fife Police (O.H.)* 1988 S.L.T. 361.

¹⁴⁴ *Twycross v. Farrell* 1973 S.L.T. (Notes) 85.

molesting and hindering the constable in the execution of his duty, and attempting to resist arrest.

At trial counsel for the appellant argued that since the constable had no reasonable grounds for believing that the appellant had committed a crime, he had no right to arrest him and not to have it considered an assault, which would have entitled the appellant to defend himself against it. The Court quashed the conviction and indicated that:

since there were no findings in the case to support the existence of a reasonable belief by the constable that the appellant had committed an offence, the constable had no right to attempt to stop the appellant from moving smartly away from the spot and that the appellant having been so stopped was entitled to struggle as he did.

Section (4) Remedies for unlawful arrest

As we have already seen an arrested person may resist unlawful arrest, and this resistance often takes place at the time of arrest. The question now is, what are the legal remedies available to the person who is submits to such a procedure?

Under the laws we are concerned with, three remedies are available. First, the person may turn to the competent prosecution or court for an examination of the legality of the arrest. Second, he may request the competent court to exclude any evidence which is based on or resulted from the unlawful arrest. Third, he may bring an action for damages or even a criminal action for false imprisonment.

Egyptian Law

Egyptian law contains various remedies for a person illegally arrested: he may complain to the competent public prosecution authority or the court, challenge the admissibility of evidence resulting from such an arrest or he may bring criminal action against the arrestor for false imprisonment.

Complaint against unlawful arrest

In order to avoid arbitrary arrests and to ensure that no one is illegally detained or arrested, Egyptian law authorizes judiciary members to supervise prisons and jails. Article 42 of the Egyptian Criminal Procedure Act 1950 provides that members of the public prosecution and chiefs and deputies of first instance and appellate courts are entitled to visit public and central prisons located within the jurisdiction of their court circuits and to ensure that no one is illegally arrested, and they are also entitled to have access to registers, warrants for arrest and detention, and take copies thereof. They are entitled to get in touch with any detainee and hear his complaint. The chief and staff of the prison must provide them with any assistance which they demand.¹⁴⁵ Moreover, Article 43 provides that a person detained in any of the places referred to in Article 42 has the right at any time to submit to the chief of the prison a written or verbal complaint and request him to convey his message to the public prosecution. The chief should accept it and immediately report the complaint to the public prosecution after recording it in the register maintained for this purpose.¹⁴⁶

Where a person is arrested and detained under the State of Emergency Act 1958, after being detained for thirty days, he himself or any other concerned person has the right to appeal against the arrest or the detention. The appeal should be submitted free of charge to the State Security Court, which should decide within fifteen days whether or not to release the person or to continue his arrest; otherwise the person should be released.¹⁴⁷

Challenging the admissibility of evidence

According to Egyptian law unlawful arrest renders any subsequent procedure unlawful where such procedure is connected with the arrest.¹⁴⁸ The connection between unlawful arrest and the subsequent procedure may be an actual *de facto*

¹⁴⁵ The Egyptian Criminal Procedure Act 1950, Art. 42.

¹⁴⁶ Ibid, Art. 43.

¹⁴⁷ The State of Emergency Act 1958, Art. 3

¹⁴⁸ Obaid. R., *Al-Mushkelat Al-Aamalliyyah Al-Hammah Fi Qanun Al-Ijra`at Al-Jaza`iyyah* (Arabic) (Significant Practical Problems in the Criminal Procedure, part 1) 3rd edn 1980 p. 38.

connection or legal *de jure* connection.¹⁴⁹ For example, if a person is illegally arrested for an offence and when questioned by the police confesses to committing the offence, the connection between the illegal arrest and the confession in this case is an actual connection, because the confession was an actual result of the arrest. A legal connection between an unlawful arrest and subsequent procedure is often present in search upon arrest, since the law entitles the police to search a person whenever they have the right to arrest him. Therefore where a court decides that the arrest of a person is unlawful it consequently should exclude any evidence obtained from the search of the person which followed his arrest.

On the other hand, if the subsequent procedure was not connected with the unlawful arrest, the court in this case may admit any evidence resulting from such procedure.¹⁵⁰ For example, suppose a person is illegally arrested by a police officer and when questioned by the police about the offence for which he was arrested, denies it. However, it when subsequently interrogated by the prosecution he confesses his involvement in the offence. Such a confession is obviously not connected with the arrest and accordingly it may be admitted in evidence.

Bringing a criminal action

Where an arrest is illegal the arrestor may be liable for the offence of illegal arrest and he may be punished by detention or a fine not exceeding 200 Egyptian pounds.¹⁵¹ It should be noted however that where the arrestor is a public servant he may not be liable for the offence of illegal arrest. That is what may be understood from Article 63 of the Egyptian Penal Act 1937 which provides that there is no crime if the act is committed by a public servant in either of the following cases:

¹⁴⁹ Al-Mohannadi. H., *Al-Qabdh Ala Al-Muttaham Fi Al-Qanun Al-Misri* (Arabic) (Arrest of an accused person under Egyptian law) LLM thesis the University of Cairo 1993 p. 531; Al Husaini. S., *Al-Nadhari'yah Al-Aammah Lil Taftash Fi Al-Qanun Al-Misri* (Arabic) (The General theory of Search under Egyptian Law, PhD. thesis, Cairo University 1970, p. 469.

¹⁵⁰ See Obaid. R., *supra*, n. 147 p. 45.

¹⁵¹ Article 280 of the Egyptian Penal Act 1937.

- 1) If he committed the act in execution of an order issued to him by a chief with which he is required to comply, or he believes that such compliance is obligatory.
- 2) If he in good faith committed the act accordance with the law or he believes that the execution of the act is within his powers.

Accordingly, a police officer who illegally executes an arrest may not be liable for the offence of illegal arrest if his conduct falls within the provisions of Article 63. The belief of the officer that his conduct is legal should be based on reasonable grounds and the burden of proof rests upon him.¹⁵²

According to the general principle of the Egyptian penal law, even a private citizen may also not be liable for the offence of illegal arrest if, when exercising unlawful arrest, he was under a mistaken belief that his conduct was legal. But he must prove on reasonable grounds that he was under a mistaken belief and that he was acting in good faith.¹⁵³

The UAE Law

The remedies for unlawful arrest under UAE law are similar to the remedies provided by Egyptian law. A person unlawfully arrested and detained has the right to complain to the prosecution, he may challenge the admissibility of evidence connected with the arrest and he may bring a criminal action against the arrestor for false imprisonment.

Complaint against unlawful arrest

Under the UAE Penal Procedure Act 1992 Act members of the prosecution have the right to enter penal facilities located within the jurisdiction of court circuits in which they work to ensure that no one is detained unlawfully. They should have access to registers, warrants of arrest and detention, and may take copies thereof

¹⁵² See Ramadan. O.S., *supra*, n. 127 p. 529.

¹⁵³ *Ibid*, p. 347

and get in touch with any detainee and hear his complaint. They must also be provided with all assistance to obtain the information which they demand.¹⁵⁴

It appears that the object of granting the public prosecution the right to supervise jails and prisons is to make sure that there is no one illegally arrested or detained in such places. In addition, any person detained in such places can any time submit to the person in charge of its administration (a warder) a written or verbal complaint requesting him to convey his message to the public prosecution. The warder should accept and immediately report the complaint to the public prosecution and, before doing so, he should record the complaint in a register maintained for this purpose.¹⁵⁵

In practice however, the public prosecution uses its right to visit penal facilities infrequently. Therefore it would be more effective if the law, instead of giving the public prosecution the right to supervise penal facilities, designated a particular authority, whether derived from the prosecution or from the judiciary in general, to undertake supervision of penal facilities as a duty and not merely a right.

Challenging the admissibility of evidence

A person unlawfully arrested may challenge the admissibility of evidence obtained from any procedure resulting from the arrest since under the UAE law unlawful arrest renders any subsequent procedure unlawful. The UAE in this matter follows exactly the direction of the Egyptian law. Therefore in order to avoid any repetition reference is made to what has been said above.

Bringing a criminal action

Where an arrest is illegal an arrestor may be guilty of the offence of false imprisonment. A person illegally arrested has the right to bring a criminal action against the arrestor. Article 344 of the UAE Criminal Penal Act 1987 provides that whoever illegally kidnaps, arrests, detains, or deprives a person of his

¹⁵⁴ The UAE Penal Procedure Act 1992, Art. 320.

¹⁵⁵ Ibid, Art. 321.

freedom, whether by himself or through another, by any means without lawful justification, should be punished by a term of imprisonment. Again, and similar to what has been stated under the Egyptian law, where the arrestor is a member of a public authority he may not be liable for the offence of false imprisonment in specific cases. Article 55 of the UAE Penal Law Act 1987 provides that there should be no crime if the act is committed by a public official or a person entrusted with a public duty, in either of the following two cases:

- 1) If the act is committed in execution of an order issued to him by a person lawfully authorized to issue such an order, and obedience to whom is incumbent upon him.
- 2) If he commits, in good faith, an act in execution of the law.

As the UAE is in the main driven by the Egyptian law, general principle implies that even where the arrestor is a private citizen he may not be liable for false imprisonment if he manages to prove that he effected the arrest in good faith and he had reasonable grounds for the mistaken belief that his conduct was lawful.

English Law

Under English law a person unlawfully arrested and detained has a right to three remedies. He may initiate proceedings for habeas corpus, challenge the admissibility of material obtained during the procedures subsequent to the unlawful arrest, and he may bring an action for damages for false imprisonment against the police.¹⁵⁶

Habeas corpus

Habeas corpus is an application for a court, from a person illegally arrested and detained or on his behalf, to issue a writ to the detainor requiring him to produce the detainee before the court and give the reason for the detention. Although the

¹⁵⁶ Zander. M., *supra*, n. 11 p. 159.

application should include a requirement for the person be released, the writ does not amount to an order for the release of the detained person. A person to be entitled to habeas corpus should present a *prima facie* case of illegal arrest upon affidavit. Then the court has a discretion as to whether to issue the writ or to adjourn it, which is what happens in practice. The writ can be refused by the Divisional Court, but a single judge has no authority to refuse such a writ; however he may direct an application on a motion to the full court.¹⁵⁷

The writ should be served upon all the defendants and contains the date, time and the place of hearing. The defendants will usually be the appropriate chief officer of police, the custody officer and the officer in charge of the case.¹⁵⁸ If the return of the defendant is in conflict with the facts which are stated in the affidavit of the applicant, the onus of proving illegality of detention rests upon the applicant.¹⁵⁹

Although habeas corpus constitutes a speedy remedy to a person held illegally at a police station, it seems that the court does not give it major consideration because in most cases it decides to adjourn the issue. This makes habeas corpus an ineffective remedy which leads suspects and solicitors to rarely rely upon it.¹⁶⁰

Challenging the admissibility of evidence

The second remedy for a person unlawfully arrested and detained is to argue at his trial that the illegality of his arrest renders evidence in subsequent proceedings inadmissible. Section 78 (1) of the Police and Criminal Evidence Act 1984 provides that “in any proceedings the court may, in its discretion, refuse to allow evidence, on which the prosecution proposes to rely, to be given if it

¹⁵⁷ See Tony Gifford and Paddy O'Connor, '*Habeas Corpus*' Legal Action Group Bulletin, August 1979, p. 182.

¹⁵⁸ See in general Wade, *Administrative law* (Oxford, 6th edn, 1988) pp. 617-624; R Sharpe, *Habeas Corpus* (Oxford, 2nd edn, 1989).

¹⁵⁹ Tony Gifford and Paddy O'Connor *supra*, n. 157 p. 183.

¹⁶⁰ *Ibid*, pp. 183-184, and see also David Ashby, *Safeguarding the suspect*, (The Police, powers, procedures and proprieties) edited by J. Benyon and C. Bourn, 1986, p. 184.

appears to the court that, having regard to all circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

It appears from the provision that only evidence which affects the fairness of the proceedings may be excluded. Therefore a trial judge in deciding whether or not to exclude evidence obtained from procedure which followed illegal arrest, should first evaluate the effects of such evidence on the fairness of the proceedings.

Unfortunately, the English judicial system is inclined to the rule that evidence illegally obtained can nevertheless be admissible.¹⁶¹ Moreover as Roskill LJ ruled in *R v. Sang*¹⁶²

a trial judge could only exclude evidence which was of little probative weight but of highly prejudicial effect.

Bringing a civil action

The third remedy to a person unlawfully arrested is to bring a civil action for damages for false imprisonment against the police as represented by the chief constable since he is liable for the actions of his officers. Section 48 of the Police Act 1964 provides that the chief officer is liable for torts committed by constables under his direction or control in the performance or purported performance of their functions.

In *Reynolds v. Commissioner of Police for Metropolis*¹⁶³ the plaintiff was arrested in the early hours of the morning in connection with the offence of arson for gain. She was taken by police car to a police station. The journey took two and a half hours. She was detained until 8 pm the same day, when she was told there was no evidence against her. She got home around 11 pm. She brought an action for damages for wrongful arrest and false imprisonment against the

¹⁶¹ See *R v. Kulynycz* [1970] 3 All ER 881.

¹⁶² *R v. Sang* [1979] 2 All ER 46.

¹⁶³ *Reynolds v. Commissioner of Police For Metropolis* [1982] Crim LR 600, and see also *Allen v. Metropolitan Police Comr* [1980] Crim LR 441 in where the plaintiff was awarded £1,115 damages for unnecessary force used in arrest.

commissioner and the officer. The trial judge ruled that they had no reasonable grounds for suspecting her of having committed an arrestable offence, and he directed the jury in relation to damages. The jury assessed damages of £12,000 in favour of the plaintiff. The defendants appealed.

The Court of Appeal dismissed the appeal and ruled;

that on the evidence before him the judge was right to conclude that there was no reasonable ground to justify the suspicion that the plaintiff had committed an arrestable offence. Therefore, the only question was whether the damages were excessive. The judge gave the jury a proper direction, telling them to use their common sense in arriving at the appropriate figure. The plaintiff had had her liberty taken away for virtually a whole day. The incidents that then occurred were such as to make her life more unpleasant than it would otherwise have been, and they constituted a serious case of false imprisonment. Though the damages were high, they were not so high that no reasonable jury ought to have awarded them and, accordingly, they could not be interfered with.

Although the civil action is merely a subsequent remedy in order to compensate a person for his suffering unlawful arrest, it seems to me, however, to be the most effective remedy which victims of unlawful arrest and detention and their lawyers can rely on, and courts often accept such action.¹⁶⁴

Scottish Law

Under Scottish law unlawful arrest does not render subsequent criminal proceeding invalid. It however, effects the admissibility of evidence obtained by procedure correlated with it, such as search of the arrested person or of his premises.¹⁶⁵ Moreover, a person illegally arrested or detained can bring an action of damages for such illegal procedure, and he also can bring such an action against the police if they effect arrest maliciously and without proper cause.

¹⁶⁴ For further account of remedies for police misconduct in general see Clayton, R. & Tomlison, H., *Civil Actions Against the Police* (London 1987); Harridan and Cragg, *Police Misconduct* (Legal Action Group, 3rd edn 1995); Winfield and Jolowicz on *Tort* (Sweet and Maxwell, 14th edn 1994); Sime, *A Practical Approach to Civil Procedure* (Blackstone Press, 1994).

¹⁶⁵ See *Albert V Sheehan Scottish Criminal 'Law and Practice Series'* (Butterworths 1990) p. 61.

Challenging the admissibility of evidence

In *Nicol v. Lowe*¹⁶⁶ the appellant was arrested for a contravention of section 57 of the Civic Government (Scotland) Act 1982. He was searched and found in possession of incriminating Articles. At the trial his solicitor argued that the constables had no reasonable grounds to arrest his client and accordingly evidence obtained from the search should be inadmissible. The High Court held that:

in the state of knowledge of the constables in this case there being no evidence of suspicious behaviour by the appellant, no such grounds existed, and the arrest was unjustified and the evidence of the search accordingly inadmissible; and appeal allowed and conviction quashed.

Bringing an action of damages

A person unlawfully arrested can bring an action of damages against the police. In *Munro v. Morrison*,¹⁶⁷ the pursuer was arrested and charged with obstructing, molesting and hindering a police officer, contrary to the Police (Scotland) Act 1967, section 41 (1)(a). The court acquitted him with the verdict being “not proven.” The pursuer brought an action for damages against the chief constable for his illegal arrest and detention.

In considering the question of damages Lord Cowie held that:

If I had been awarding damages in this case, it would have been a substantial sum, but not in the region of the sum sued for. There is no doubt that it must be a very distressing experience to be arrested without probable cause and detained in a cell, albeit for a few hours only, but on any view the pursuer in this case was not very sensible in challenging the police as to their right to board even a private bus to remove a trouble-maker, and that must be taken into account. The pursuer has, of course, averred that he has continued to suffer distress and, as he put it, the events of that night have not been out of his mind for a single day. Counsel for the parties were not able to give much guidance on an appropriate figure, but taking all relevant matters into account I am of the opinion that fair compensation to the pursuer would have been £1,000.

Where the arrest is effected by someone who can be presumed to have been acting in pursuance of his duty (such as a police officer), it will be necessary for

¹⁶⁶ *Nicol v. Lowe* 1989 S.C.C.R. 675, and see also *Wither v. Reid* 1979 S.L.T. 192.

¹⁶⁷ *Munro v. Morrison* 1980 S.L.T. 87, and see also *Shield v. Shearer* 1913 S.L.T. 86.

an aggrieved arrestee to aver and prove that the detention was effected maliciously and without probable cause.¹⁶⁸ A constable may be considered as acting without probable cause if his act, in the light of the surrounding circumstances, is unjustified.¹⁶⁹ Malicious conduct on the part of a constable could be inferred from his recklessness to whether the person arrested or detained is innocent or not.¹⁷⁰

Malice and want of probable cause are clarified by Lord Sutherland in *Ward v. Chief Constable, Strathclyde Police*¹⁷¹ he stated that:

Want of probable cause must be tested initially on an objective basis. If, in the situation which is found as a fact to exist, there is room for doubt as to whether or not there was probable cause for the actings of the police, then because the onus is on the pursuer the benefit of the doubt must be given to the police. Even if on an objective basis there appears to be no probable cause, the matter must then be considered on a subjective basis to see whether the police officer concerned had reasonable grounds for believing that he had probable cause even though, with the benefit of hindsight, it can be seen that he did not. If he did have such grounds for believing that he had probable cause, then it cannot be said that he acted maliciously.

It was suggested that it would be enough to prove malice that the police acted recklessly and for this purpose the definition of recklessness in *Allan v. J Patterson* was said to be the appropriate test. I am not satisfied that it is useful in this context to take a definition of recklessness which is designed to cover the situation of the driver of a motor car in terms of the Road Traffic Acts. A driver of a car has a duty not merely not to act recklessly but a duty to take all due consideration for other road users and should not be involved in the exercise of balancing risks at all. A police officer facing a disorderly crowd has to take a decision as to the best method of dealing with the situation and it may well be that in deciding what is the appropriate course of action he may have to accept the risk that an innocent bystander may be injured. If his decision, however, is taken in good faith he cannot be said to be acting recklessly. It is clear from what was said by Lord Shand that even some degree of recklessness will not suffice to establish malice. Similarly, in *Robertson v. Keith* Lord Anderson refers to "that gross recklessness of action which imports malice". In my opinion what has to be shown is that the police officer acted in such a reckless manner as to show that his motive in so acting could not be said to be what he conceived to be his duty in the particular situation, but was an ulterior or

¹⁶⁸ See The Laws of Scotland: Stair Memorial Encyclopaedia, vol 15. Paras 438.

¹⁶⁹ Ibid.

¹⁷⁰ See *Shields v. Shearer* 1914 SC (HL) 33 at 37.

¹⁷¹ *Ward v. Chief Constable, Strathclyde Police* 1991 S.L.T. 292 at 297.

improper motive unconnected and inconsistent with the proper performance of his duties.

A person who alleged that he was illegally arrested or the arrest was effected maliciously and without probable cause should aver and prove such allegation. Otherwise his action against the police will not be accepted since the general rule is that a police officer acting in the course of his duty is protected against an action of damages.¹⁷²

¹⁷² Ibid, at 297.

Conclusion

As we have seen throughout our discussion of the law, arrest is considered among the most important procedures which are carried out by the police, and constitutes a serious imposition upon an individual's liberties. The police cannot dispense with the power of arrest as an effective tool to detect crime and pursue criminals and it seems that this will continue to be so in spite of any development in society. Thus it is a matter of importance to produce provisions which protect a person's rights and liberties. All the laws here studied contain provisions which entitle the police to arrest a person in specific cases. These laws on the other hand also contains provisions which are supposed to preserve the rights and liberty of a person who may be subject to arrest. In spite of the existence of such provisions the rights of individual may nevertheless, be breached. This could be due to three factors.

First, arrest as a concept is still surrounded by ambiguity and sometimes the police may confuse it with other procedure such as detention and stoppage.¹ Second, powers of arrest which are conferred upon the police are various and are extremely wide.² Third, safeguards which are provided in favour of an arrested person may be insufficient.³ Accordingly, any criminal law dealing with arrest must first set a clear definition of arrest in order to determine its elements and distinguish between it and other similar procedures. Powers of arrest must be specified in simple ways and the more the powers of arrest are contained in limited categories the more easy they are to identify. Sufficient safeguards must be provided to minimize the distress of arrest and to restrict any possibility of abuse of power by the police. In addition, proper remedies must be available for unlawful arrest, or for where an arrest is maliciously conducted or effected with excessive and unreasonable force.

¹ See supra, ch. 2. s.1.

² See supra, ch. 3. S.2, particularly the police powers of arrest without a warrant under English law and UAE law.

³ See supra, ch. 4. s.1.

There are some points regarding the law of arrest which arise during the examination of the laws discussed in this study. Most of these points essentially refer to Egyptian and UAE law. Thus it is desirable to highlight them and attempt to suggest certain recommendations which might be useful in any further amendments or reforms to the law of arrest in the laws concerned.

Arrest and similar procedure

1- None of the legislation which is dealt with in this study provides a clear or specific definition for arrest. Definitions of arrest are scattered among court decisions and opinions of jurists. As the study emphasises, arrest is considered among the procedures most clearly constituting a serious infringement on an individual's liberty. Thus it should be clearly defined and its ingredients should be without any ambiguity known to the person who may effect it, in order to avoid any undesirable effects which may result from such an ambiguity.

2- Stoppage as an a procedure which sometimes leads to arrest needs to be defined in order to distinguish between it and arrest, especially under Egyptian and UAE law which are both void of such a procedure, though the police frequently exercise it. ⁴

Powers of arrest

1- UAE law confers upon the police wide powers of arrest without a warrant. A judicial police officer can arrest a person where there is sufficient evidence to indicate that the person has committed a felony or certain misdemeanours. The law contains no definitions of "sufficient evidence", which is then left to the discretion of the judicial police officer. Therefore, these wide powers of arrest without warrant should be curtailed or at least "sufficient evidence" should be clarified. ⁵

⁴ See *supra*, Ch. 2. s.1(1)

⁵ See *supra*, ch. 3. s.2.

- 2- Although the Police and Criminal Evidence Act 1984 attempted to simplify and clarify powers of arrest without a warrant this however has not been achieved since the Act contains various and wide powers to arrest without warrant.⁶
- 3- Powers of arrest without a warrant under Scottish law are still in general governed by common law and their scope needs to be clearly defined.⁷

Safeguards of an arrested person

- 1- Both Egyptian law and UAE law should allow the accused lawyer to attend a police interview with his client.⁸
- 2- The period of arrest under the Egyptian state of Emergency Act 1958 should be reconsidered.⁹
- 3- UAE law should contain a provision which states the right of an arrested person to be informed of the nature of the offence and the reason for the arrest.¹⁰
- 4- Under Scottish law the police are only obliged to inform the accused's solicitor of the fact of arrest, and the solicitor may decide whether to attend or not. Moreover nothing in the law of Scotland ensures the right of an arrested person to have access to a solicitor immediately. These matters need to be reconsidered.¹¹
- 5- The right of silence under Egyptian law and UAE law should be codified.
- 6- The power of the police to enter premises to effect arrest under both Egyptian law and UAE law is unclear and needs to be specified.¹²
- 7- Scottish law regarding entering premises to effect arrest for statutory offences is not clear.¹³

⁶ See *supra*, ch. 3. s.2.

⁷ See *supra*, ch. 3. s.2.

⁸ See *supra*, ch. 4. s.1.

⁹ See *supra*, ch. 4. s.1.

¹⁰ See *supra*, ch. 4. s.2.

¹¹ See *supra*, ch. 3. s.2.

¹² See *supra*, ch. 5. s.1.

¹³ See *supra*, ch. 5. s.1.

8- Intimate search under both Egyptian law and UAE law should be identified and the situations where the police entitled to effect it must be specified, since such a search may constitute a great humiliation to the person submitted to it.¹⁴

¹⁴ See *supra*, ch. 5. s.2.

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